DOCUMENT RESUME

ED 051 542 EA 003 389

TITLE	Upsurge and Upheaval in School Law.
INSTITUTION	National Organization on Legal Problems of Education, Topeka, Kans.
PUB DATE	69
NOTE	216p.; Papers presented at National Organization on Legal Problems of Education annual convention (15th, Cleveland, Ohio, November 18-20, 1969)
AVAILABLE FROM	National Organization on Legal Problems of Education, 825 Western, Topeka, Kansas 66606 ($7.50)
EDRS PRICE	EDRS Price MF-$0.65 HC-$9.87
DESCRIPTORS	Activism, Administration, *Civil Rights, Collective Negotiation, Court Cases, Dual Enrollment, Freedom of Speech, *Information Systems, *Legal Aid, Principals, Private Schools, *Racial Integration, *School Law, Supreme Court Litigation, Teachers, Tenure, Urban Education
IDENTIFIERS	Due Process

ABSTRACT

This report compiles papers and panel discussions, on various aspects of school law, that were presented at the 15th annual NOLPE convention. Major presentations include: Terrence E. Hatch, "The Principal's Role in Collective Negotiations"; Philip K. Piele, "Document-Based Information Systems Responsive to Legal Problems in Education"; Sam Duker, "The Legality of Shared Time"; Haskell C. Freedman, "The Legal Rights of Untenured Teachers"; H. C. Hudgins, Jr., "The Warren Court and the Public Schools"; William T. McKnight, "Racial Integration"; Paul W. Briggs, "A Look at City Administration"; William Van Alstyne, "Constitutional Protection of Protest"; and two presentations by Gregory B. Taylor and Thomas A. Shannon on "The Impact of Legal Aid Programs for the Poor on the Operation of Public School Districts in the United States." Also included is a chronology of civil rights and the schools, north and south, black and white. (JF)

Upsurge and Upheaval
in
School Law

ED051542

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NOLPE

EA 003 389

Published by
THE NATIONAL ORGANIZATION ON LEGAL PROBLEMS OF EDUCATION
825 Western, Topeka, Kansas 66606

ED051542

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FOREWARD

Humidity hung heavy in the air, and the hot August sun appeared translucent in the Cleveland smog as Dr. Marion McGhehey, Father Joseph P. Owens, Dr. Roger Shaw and I gathered at the Hollenden House to go over final plans for the 15th Annual NOLPE Convention.

Father Owens, Program Chairman with Professor Roger Shaw, immediately took us in tow, and we proceeded to talk with the hotel management. The heavy sigh of dismay and disillusionment appeared when we learned that there was a conflict in dates--a conflict with another convention bigger than ours. Father Owens argued enthusiastically and persuasively that "he had reserved the hotel six months ago and was assured everything was firm." The hotel management remained unmoved and a hasty decision by those of us present dissolved the dilemma by moving the NOLPE Convention to a week later. Multitudinous "tunes" raced through my mind. Was this a prelude of things to come? Was a cloud coming over the NOLPE Convention? After months of hard work and planning--three at the national level--would the whole program be snafued?

In the quiet of the Hollenden House hospitality suite, Father Owens and Professor Shaw began to detail the final physical and program plans: 1) The hotel was relatively new and beautiful--Cleveland's finest; 2) there were many succulent delicacies in the kitchen, and Marion McGhehey would plan the menus; 3) the program literally sparkled with excellent speakers, dialoguing sessions, and special interest groups; and, 4) there was every indication of good attendance. My thoughts of disaster disappeared. Good food, good house, good program, good attendance--what more could a convention want?

The 15th Annual NOLPE Convention "birthed" and my fondest expectations were exceeded. Terrence E. Hatch, William T. Knight, Paul W. Briggs, William Van Alstyne and others gave wonderful presentations. Edward C. Bolmeier and Lee O. Garber "stole the show" with their reminiscing of "Upsurge and Upheaval--Thirty Years of School Law" at the banquet on Friday night.

As NOLPE's President, I was privileged to preside over the 1969 Convention. I am now equally privileged to write the Foreward to this outstanding publication, UPSURGE AND UPHEAVAL IN SCHOOL LAW. By the way, the Convention theme and subsequent title of this publication is the brain work of Father Owens. This publication is destined to become an important edition to the ever-growing list of publications in school law. I am delighted to recommend it to our NOLPE membership and others whose interest in school law dictates serious commitment to scholarly, informative and well-written publications.

My hearfelt thanks and appreciation are extended to the distinguished Father Joseph P. Owens and the able and scholarly Professor Roger Shaw. Father Owens and Professor Shaw not only made the total program arrangements but sweated with me the final appearance of all scheduled speakers, panelists, presiders, exhibitors, weather, and airline schedules. I am equally indebted to Dr. Marion McGhehey, Executive Secretary of NOLPE, for steering me through a good year, paying the bills, looking after endless convention and operational details, and putting this manuscript together. My fondest appreciation is reserved for Mrs. Mary Shaw and her associates for the hospitality extended to the wives present. NOLPE is indeed blessed with many able, talented, and wonderful people.

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THE PRINCIPAL'S ROLE IN COLLECTIVE NEGOTIATIONS

by

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The role of the principal in collective bargaining is very difficult to define in legal terms. Rezny's NOLPE book, *The Law and the School Principal* says very little on the principal's legal authority and responsibility in staff personnel administration. There is practically no legislated law specific to the principalship. Basically the principal's sphere of operation is defined in school board policy or else delegated to him by the superintendent. Much of his authority grows out of and is legitimatized of the exigencies of school operation; thus it might be classified as common law. His role in collective negotiation is emerging largely in this manner. In a recent publication, Campbell makes this observation:

> As organized teachers go directly to boards of education with their grievances, the authority of superintendents and principals appear to be reduced. At the same time the increasing complexities in school operation put lay boards at a disadvantage *vis-a-vis* their administrative staffs. The administrators are often better informed on important issues and they possess the expertise required to make many educational decisions. In any event, policymaking is in a state of flux, and societal forces are altering local policy deliberations in significant ways.[1]

UPSURGE AND UPHEAVAL IN SCHOOL LAW

At the Milwaukee Meeting, Professor Arthur A. Rezny talked on the role of the Administrator in Professional Negotiations which, though generally applicable to all administrators, applied chiefly to the role of the Superintendent of Schools. He said:

> **The superintendent of schools as the general administrative officer is at once a state and local office. He is legally and technically the executive officer of the Board of Education. It is at this moment that much of our trouble begins because many superintendents see themselves and many of the faculty immediately see him simply as an employee of the board of education without much relationship to the faculty. If our major purpose is instruction or learning, then the superintendent's major concern is the development of this major objective. It seems more appropriate that the board of education look upon him as their education advisor rather than the executive officer of the board.[2]**

According to Rezny, the superintendent was not to be the chief negotiator for the board of education but to serve as the "educational leader" who would provide information which brings about understanding during the negotiations process. Thus he plays a dynamic functional role as a purveyor of information. To what extent the ideal role depicted by Arthur is being carried out throughout the U. S. is problematical. My observation is that he is becoming more and more aligned directly with the school board in negotiation usually as the chief negotiator except in large school systems where an associate Superintendent or administrative assistant performs the role.

There is much evidence today that many Superintendents, Boards of Education, and Principals themselves place the principal in the category of being strictly a "board man." It may have been, or will be inevitable for the superintendent to become the board's man in negotiations, but I think it entirely possible that the principal need not

serve this same role. Most boards of education and superintendents are unsophisticated in dealing with teacher militancy and the bargaining process, thus tend to want the principal to take a polarized stand with the board in negotiations and in administering the contract. I know of cases where the board has expected the principal "to nail the teachers hide to the wall" by a rigid legalistic interpretation of the "master agreement" and then wonder why there is much grumbling and grievances brought by teachers against management.

Some preliminary findings from some research being conducted by the author suggests that teachers, superintendents and board members still expect the principal to give leadership in:

1. Looking out for the welfare (health, safety, social and educational development) of each child.
2. The recruitment, selection, assignment, inservice education and evaluation of staff.
3. Determining the curriculum, selecting learning experiences and supervising instruction.
4. Dealing directly with parents and other patrons of the school on school matters.
5. Managing the school.

If he is to perform his leadership role in the major areas of responsibility he must be given authority (which hopefully he will share with staff) and be involved in the processes where decisions are made which affect school operation.

It is generally felt by principals throughout the country that they have been left out in the negotiations process, but are then expected to implement matters agreed to, often under unrealistic if not impossible conditions. Recently the teachers in a large school system in Utah negotiated a dutyfree lunch period for all teachers and the board of education provided only one para-professional to supervise 800 students. In another district the teachers negotiated an agreement which provided for a formal grievance procedure with the principals responsible for administering the 1st phase. Again not one principal was involved in the formulation of the content of the master agreement or the development of the grievance procedure or given orientation on its administration. Under these conditions the principal tends to be intimidated by the grievance process. He is subject to the abuse of teachers who are frustrated by conditions which may be unrelated to the immediate school situation, yet his effectiveness is likely to be judged by the number of grievances which originate in his school.

Another place where the principal is subject to abuse relates to the role he is expected to play during a strike. For example, in Utah the School Board Association objected to this policy statement on impasse situations which was developed by the principals' association and was approved by the Utah Educational Association.

> Because the quality of any educational program is dependent largely upon the quality of instruction, the principal will assign professional duties to professional staff only; but may assign non-professional duties to non-professional personnel in the interest of the safety and welfare of students.

They tried to get the principals to agree to this statement: 'Further the principal is responsible for the operation of his school regardless of the impediments caused by withholding of services, sanctions, etc. . . .' The School Boards Committee later modified the statement to read as follows:

> They (the Principals) will endeavor to carry out directives of the superintendent as he follows the desires of the board, and that in the event that they cannot in good conscience execute with vigor a board policy they should, as all employees of any organization when such a personal conflict exists, offer their resignation.

The implications of these statements are obvious. The Principal is expected to be the hand-maiden of the school board regardless of the irrationality of its action.

A sub-committee of the Utah Legislature is currently attempting to write negotiation legislation which is acceptable to the profession and the Utah School Boards Association. One of the big hang-ups right now deals with the personnel positions to be covered by the bill. The school board association wants to have only classroom teachers covered, thus under the law principals and other administrative and supervisory personnel would not have a right to represent themselves in negotiations with the board of education or be represented in the teacher unit. The principals are now asking to be heard and hopefully are being listened to by the group developing the legislation. It is most significant, however, to note that there are representatives of the Utah Educational Association, the Society of Superintendents and the School Boards Association on the committee, but not one from either the elementary or secondary principals' associations.

So much for some general background of the problem, and excuse me for using examples from a state which is small and unsophisticated in the inter-human relationships of the bargaining process. Yet, at least from the standpoint of the principal, the problems referred to above are not uncommon to school district sub-systems in many other states.

The Principal and Negotiations Legislation

Principals have not been adequately involved and consulted when legislation covering negotiations has been written. There is evidence on this in Minnesota where the state principals' association asked to have legislation rewritten to provide for (among other things) a separate bargaining unit for principals and other non-teaching personnel. The association argues this way:

The secondary school principal finds his position under this law to be quite untenable. The law must be changed so that the teacher cannot negotiate for the principal. The reasons for this are:

1) It is bad business to have a supervisory employee in a situation where his salary and working conditions are controlled by the personnel that he is charged with employing, recommending for dismissal, discipline, and in general, supervising.

2) The principal must be the consultant to the board of education when teachers are negotiating district policy, operational procedures, disciplinary procedures, and curriculum. Unless the principal serves the board in this capacity, there is no other person in the negotiating area that has a thorough knowledge of the operation of the school building. (The superintendents job is now such that it is impossible for him to have this close contact with the operation of his district.)

3) The principal is the individual who, in the final analysis, must implement and enforce the agreement between the board of education and the teacher unit.

4) Grievance procedures are becoming a part of teacher-board agreements. The principal is the first level of appeal in a grievance procedure.

5) The principal is held accountable by his superintendent, board of education, and community for the total operation of his building and the program of education therein. Consequently he must be able to participate in the discussions with the teachers.

6) Experience in other states and in Minnesota indicates that future

negotiations will be concentrated upon operational procedures, student discipline, curriculum, and other items not economic in nature.[3]

There has been need for clarification of a Michigan law. The California Winton Act has also come under strong attack on the issue of administrator representation, and there is some strong feeling that the law should be changed.

Principal's Involvement in the Bargaining Process

Principals have not been consulted during bargaining sessions when teacher welfare and working conditions which affect school operation have been negotiated. Teachers and Boards of Education have negotiated all of the following items without Principals being represented: separate teacher facilities such as: lunch rooms, restroom, and lounges; class size; length of school day, substitute teacher policies; student assignment to classes; discipline procedures; number and length of staff meetings; supervision of extra-curricular activities and other non-teaching duties such as: bus loading, school lunch supervision.

These are all vital areas with which the principal is concerned and for which he is accountable. There is a saying that the "cow soon forgets when she was a calf." I think this might be paraphrased to apply to the superintendent and other central office staff when negotiating items affecting school operations when they haven't administered at the building level for some years. There are also many central office personnel making decisions concerning the operation of schools who have never been in an elementary or secondary school since they attended as students. The teacher, by the very nature of his assignment tends to have tunnel vision regarding the school operation. One of Websters definitions of a tunnel is: "a broadmouthed net or snare for game having a pipelike extension that narrows at the end." Not used much any more for catching game but revived by teachers for catching the unwary principal.

Successful principals must have peripheral vision, that is, be able to see things in their broad aspects, know the inner working parts, relate the isolated segments, and make them into a working whole. To not involve principals in the vital process of negotiating working conditions is risky business. Not only is a wealth of sound wisdom neglected but the matter of reaching an agreement which can be implemented and administered is diminished.

What negotiations role is the principal to be cast in if he is to be heard and perform his role well? There is not complete agreement on this matter in the profession. In many states the principals can't agree among themselves, nor do teachers groups, superintendents, or boards of education agree. Perhaps several models will be used for some time. During the initial years when teachers were asking for formal negotiations, principals tended to want to remain neutral and not get involved in the bargaining process. However, when they saw that their welfare was being jeopardized and prerogatives which were once theirs being negotiated away, they discovered that they had to be involved.

Representation in Teachers Bargaining Unit. Principals in many systems, are still represented by the teachers' organizations and often serve on the teacher's bargaining team which negotiates with the Board of Education. The logic of this pattern is discussed in a New York State Public Employment Relations Board ruling in July, 1968, on a dispute concerning whether the principals could be represented in bargaining by the Depew Teachers Organization. The Board of Education of Union Free District Number 7, maintained that because the principal must manage pupil and teacher evaluations, as well as teacher assignment and retention there was a conflict of interest and that the principal must be regarded as a part of management in as much as principals are our "...right arm...eyes and ears..." The teachers' association on the other hand, with the support of the principals, maintained that there was a substantial community of interest which was marked by cooperation and consultation rather than by disciplinary authority and that the aims of the educational objectives of the principal coincide with those of the teachers. The Public Employment Relations Board summarizes the rationale for its decision which is well worth reading by those interested in this subject and then affirmed that:

> Accordingly, the broad community of interest shared by the teachers and principals in such matters as their basic mission, the substantial similar method of salary determination, and common fringe benefits, mandates the creation of a single negotiation unit.[4]

Representation on the Boards Bargaining Team. The second way the principals can be represented in negotiations is by being a member of the negotiations team representing the board of education. In Salt Lake City, one elementary and one secondary principal are on the Board's team. Incidentally, the superintendent is not on the team. The chairman and spokesman for the team is the Director of Teacher Personnel. This plan has been in operation for two years. The principals who served on team have felt their position in the school was not jeopardized by serving in this capacity. Negotiations went smoothly in the spring of 1968, but were much rougher in 1969, when money was tighter. The principals became alarmed when the teachers suggested reducing the number of administrative positions in the secondary schools and cutting other services. They are not quite so sure they can continue to serve on the Board's team.

Serving as consultants to the board. The Minnesota Association of Secondary School Principals have recommended that principals not serve on the confrontation team and absolutely should not when teacher's salaries are being negotiated. The reasoning is that this would jeopardize the good working relationship between the principals and the teachers. In Michigan where the principals have been pushing for what is called the adoption of the "Management Team Concept" the Elementary and Secondary Principals Association developed a guideline statement which says that the principal must serve in an advisory capacity during negotiations representing management and that they may serve on the board's negotiations team at the discretion of the Board of Education.[5] However, in a team management agreement entered into by the

Dearborn 8 Board of Education and the administrators' association in article IV section E it was agreed:

> ...that no member of the Association employed as a principal or assistant principal shall represent the Board in any negotiating or collective bargaining session with representatives of any other bargaining agent. Such agreement will not hinder the participation of the principals and assistant principals as consultants to the Boards bargaining team.[6]

Superintendent Donovan of New York points up that the N.E.A. appears to becoming a classroom teacher's organization and says:

> If it is, unfortunately, the very nature of this makes it difficult for supervisors and teachers to be together in the same organization when negotiations is a big process. We are all in an educational business; we should be theoretically together. That is one of the reasons why I will not allow principals at the bargaining table. I sit at the bargaining table with my deputy superintendents. In another room I have the principals and others who advise me as to how far I can go and what it will do to their schools. They do not sit at the table because I do not want a confrontation between the men who are going to have to work out the problems in the schools and the teacher who are making the demands in that particular school.[7]

The first official statement made by the National Association of Secondary School Principals (NASSP) concerning the principal's role in negotiations was written by Benjamin Epstein in 1965. In this publication Epstein emphasized that the principal must be involved but wasn't too specific concerning his role except that he felt the principal could be on the negotiations team representing the Board of

Education in small districts while principals may find it necessary to organize strong negotiating units of their own in cooperation with other administrators and supervisors in large systems.[8]

Since the principal is expected to have and should have a very close working relationship with the staff, the general feeling among them is that the interests of education would best be served if they serve in a consultive capacity when the teachers agreement is being negotiated, rather than as a member of the board's or teacher's confrontation team. Though this is a preferred role, there is very little written on how the principal will serve in this capacity. Will he be a consultant only when called by the board's team, when the principals request representation or in some other way. Some principal's groups are asking that one principal be present during all negotiations sessions in a non-official capacity to observe, to give opinions, when asked, and to carry information to the principal's organization.

Each year fewer principals are included in the bargaining unit represented by teachers and even fewer are members of teacher confrontation teams. Principals in greater numbers are serving on school board's teams and principals are more aggressively asking to be consulted on issues affecting school operation. It may be too early to suggest any one model as best serving the interest of principals more effectively than others. The most important matter seems to be that his expertise be used in the bargaining process.

The Principal's role in the Grievance Process

The principal is the key administrator in "Taking the grief out of the grievance," to borrow a catching title from a N.E.A. pamphlet. The NASSP and all state principal's associations recognize that the principal should be the person to whom the grievance is brought by the staff assigned to his school. The general sequence in which the principal is involved as suggested jointly by the California School Boards Association and the California Association of School Administrators[9] and by Lutz *et. al.*,[10] follows. First, as the teachers immediate superior he is charged with meeting the agrieved person informally and resolving the problem (problem used here to mean not a formalized or institutionalized grievance). Every reasonable effort should be made to settle complaints by consultation, personal conference and other administrative techniques during this stage. Actually the most successful principals have always handled grievances in that manner and it should be a requirement that this avenue to be persued before resorting to the adjudicatory process.

Adjudication begins with formal step 1, in which (in most grievance procedures) the principal is still the person to whom the formal grievance is brought. At this level the grievance must be submitted in writing and should have been reviewed by the grievance review committee of the teacher's organization. This committee hopefully would screen out all unjustified grievances. During this phase it is the Principal's responsibility to meet with the teacher and his representative. He should also have the right to have a witness or witnesses present.

Ideally, it would he hoped that the grievance would be settled at the informal stage, but if not, certainly at stage one. This may be an unrealistic assumption because it is based on the notion that most of the grievances stem from interpersonal relationships occuring at the building level. Close analysis of many grievance situations reveals the source of the injustice, supposed or real, originates in the central administration or with the Board of Education. If this is the case the Principal is caught in the middle, particularly so, if he is expected to implement and administer policies and procedures arrived at without his participation. Surely his skill in initiating and maintaining a climate in his school which will foster good interpersonal relationship with the staff will be tested at this point. Such a climate will reduce the incidence and in the event "problems" do arise facilitate their resolution.

If the grievance is not solved at level 1, the principal judgment is placed in the hands of the hierarchical structure designed for resolving the grievance in the succeeding phases of the grievance process. If the principal is to be protected, he must be allowed to be present, present documents, bring witnesses, and have counsel, the same as the agrieved person. Otherwise he is apt to make consessions at level I which should not be made, and which in the long run will create even more problems.

Principal's Role During a Strike

The principal's role during a strike can be handled very quickly. He has an obligation to maintain the school in a "safe and ready" condition for the beginning or resumption of school. This role is demanded by the practical aspects of the situation and school boards should insist on it. Generally, teachers recognize the need and do not object to this role. The difficulty arises when school boards insist on running schools with volunteers and substitutes. Often this is done without the board understanding all the implication of such action. In a situation where boards take the attitude of opening the schools "come hell or high water" the legal implications from the standpoint of pupil safety have many ramifications and the principal is placed "on the spot." It would seem wise for some guidelines on strikes to be developed jointly by the principals and the central office and approved by the board in advance, when the atmosphere is calm.

These guidelines should give the principal some prerogatives in dismissing school when in his judgment such action is necessary. Obviously the responsible person in the central office should be readily available to give counsel at such times. Thomas Shannon gave this sound advice to Utah principals regarding this matter:

> The principal has the most critical role of any member of the school district's management team during an employee strike, and this function does not come into focus until after the strike is concluded. This function is to "pick up the pieces and make things whole again." He further observed that a strike leaves ugly scars, the staff is split, parents and other members of the public are alienated, student discipline is loosened and

> the board is seen in an adversary posture to school district employees.

After the strike the principal is in the best position to put things together and smooth over the wounds provided he has as Shannon says 'walked the edge of the cliff'. Even though he has been involved in the bargaining process as a member of the management team he must: 1) leave bargaining at the bargaining table. 2) not express antagonistic views around the staff at school. 3) avoid making public pronouncement regarding the functioning of the school and his point-of-view on the issues. and 4) avoid confronting pickets. 5) his every action and decision should be based on the idea that soon the strike will be over, thus he is prepared to move quickly to recreate from the chaos a sound staff and community relationship.

Concluding Statement

In conclusion it is well to remember that: 1) the principal operates from a base which is not legally legislated, and one which is somewhat powerless, 2) that he has been stripped of much of his leadership role by the central administration and 3) that he is somewhat removed from the decision making center of school operation and therefore is severely handicapped in becoming actively involved in the bargaining process. As Luntz points out:

> This "leadership" role, in the light of the reality of the distribution of power among the teachers, school boards, and superintendents, and the prescribed role of the principal in the school bureaucracy, is an unrealistic one. Many teachers realize that although their building principal functions in the formal organization as the communication link in the line between themselves and the central administration, they can more readily achieve their goals via the informal communication channels maintained among teacher organization leaders,

> chief administrators, and board members. This is especially true in school districts where in their rush to mollify teacher militancy, superintendents maintain an "open door and board members an "open telephone line." In situations where blatant dysfunction of the formal organization exists, teachers perceive of the principal as being in a position to provide only tentative decisions pending approval of the highups, at best. Where such relationships exist, teachers soon find it more fruitful to by-pass the principal completely, or out of consideration for the 'Good Joe' principal, engage in a mock and/or courteous interaction.[11]

If the principal is to retain whatever leadership position he has today and gain the stature often prescribed to him as the "educational leaders" of his faculty, he will have to be in the forefront (as a member of the management team) of recommending and pushing for many of the improvements in the teaching-learning environment which teachers are legitimately asking for today. However, his main source of strength will come from the quality of the leadership he provides the school for as Cunningham suggests:

> The ability of the principal to survive and flourish during and after this transition period will depend on his capacity to respond and adapt to new circumstances. Since genuine participation of the principal in teacher negotiations seems an unlikely prospect, it will be the individual building principal who has kept his fences mended in the important area of principal-staff interaction, and thus, has won the respect of his teachers who will ultimately prevail. The administrator who has drawn his authority from the nature of his office, rather than from personal and professional sources, will not survive the change in the authority structure.[12]

FOOTNOTES

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[2] Renzy, Arthur A. The Role of the School Administrator in Professional Negotiations. (Mimeographed) Milwaukee: University of Wisconsin Department of School Administration (Undated) p. C-8.

[3] Minnesota Association of Secondary School Principals: The Secondary School Principal– and the Meet and Confer Law. (Mimeographed) Minneapolis: The Association (undated) pp. 1 & 2.

[4] N.E.A. Negotiations Research Digest (October, 1968) p. C-16.

[5] Michigan Association of Elementary School Principals and Michigan Association of Secondary School Principals, Guidelines for Michigan Principals. Ann Arbor, The Association; 1968, p. 28.

[6] N.E.A. Negotiations Research Digest (February, 1969) p. D-3.

[7] Donovan, Bernard. "New York City–Workshop for Teachers Militancy" in Carlton, P.W. and Goodwin, H.I. (Editors) The Collective Negotiations Dilemma. Worthington, Ohio: Ch. A. Jones Pub. Co. 1969, p. 141.

[8] Epstein, Benjamin. The Principal's Role in Collective Negotiations. Washington, D.C.: National Association of Secondary School Principals. 1965, p. 5.

[9] California School Boards Association and California Association of School Administrators, Employer Grievance Procedures. Burlingame: The Associations, 1968.

[10] Luntz, Frank W. et. al. Grievances and Their Resolution, Danville: The Interstate Printers, 1967, p. 71.

[11] Luntz, op. cit., p. 82.

[12] Cunningham, Luver L. "Collective Negotiations and the Principalship" in Carlton, P.W. et. al., op. cit. p. 259.

DOCUMENT–BASED INFORMATION SYSTEMS RESPONSIVE TO LEGAL PROBLEMS IN EDUCATION

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Educational Administration
University of Oregon

I am indeed honored to be invited to address this gathering of educators and lawyers concerned with legal problems in education. The focus of my presentation today will be document-based information systems responsive to these problems. I emphasize the words *document-based* and *education* because I do not intend to discuss commercial computerized legal research services extant in a number of States, such as the Legal Citation Service in New York or the Law Research of California--a corporation engaged in providing specialized computerized legal research services to attorneys; nor do I intend to discuss the variety of retrieval systems for legal information such as Project LITE (Legal Information Through Electronics) at the Air Force Center in Denver or the Department of Justice "LEX" System.

There exists today a rapidly growing information network for dissemination of research and research-related materials in education. The network in its present form is composed of a loosely organized group of document-based information systems involved in the business of information analysis and dissemination. At the present time, there are three document-based information systems either directly or indirectly involved in collecting, analyzing, and disseminating information related to legal problems in education: School Research Information Service (SRIS), Direct Access to Research Information (DATRIX), and Educational Resources Information Center (ERIC), particularly the ERIC Clearinghouse on Educational Administration. By far the most ambitious and comprehensive of these three systems is ERIC. But before I discuss the operation and services of the ERIC system, I will briefly describe the services provided by SRIS and DATRIX.

School Research Information Service (SRIS)

Phi Delta Kappa began SRIS in September, 1967, with the aid of a Kettering Foundation Grant. The service's purpose is to communicate among the educational community information gained through research and innovative practices. On request, SRIS will provide abstracts and complete texts of research reports on most educational topics, including information related to school law. Documents cost 25 cents per microfiche or 10 cents per page in paper copy. Since SRIS in some ways duplicates services offered by ERIC, inquiries addressed to SRIS will be answered with relevant SRIS documents and a list of relevant ERIC documents. Address requests to SRIS, Phi Delta Kappa, Research Service Center, 8th and Union, Bloomington, Indiana 47401 or telephone (812) 339-1156.

Direct Access to Research Information (DATRIX)

DATRIX was inaugurated in the summer of 1967 by University Microfilms, a Xerox subsidiary. DATRIX supplies reproductions of any of the more than 126,000 doctoral dissertations which University Microfilms has stored on microfilm since 1938.

Users of DATRIX must write for a free copy of Key Word Lists in the desired broad subject field ("Chemistry/Life Sciences," "Engineering/Physical Sciences," and "Humanities/Social Sciences"). The user selects from the list one or more words that define the topic he wishes to be searched. DATRIX's computer then searches the file of dissertations and lists those relevant to the specified topic. For the first 10 bibliographic references listed, the user pays $5.00; 10 cents for each additional reference.

Complete copies of the dissertations can be purchased either in microfilm (1-1/4 cents per page, $3 minimum) or in paper copy reproduced xerographically from microfilm (4-1/2 cents per page, $3 minimum).

University Microfilms since 1938 has published *Dissertation Abstracts*, a monthly cumulation of abstracts of recently completed dissertations. Each reference produced by the computer search includes a citation of the volume and page number in *Dissertation Abstracts* where the user may locate the dissertation's abstract, before ordering its complete test. DATRIX's computer search thus performs for the researcher the task of searching all 28 volumes of *Dissertation Abstracts* to compile a bibliography of relevant dissertations. Write to University Microfilms, Library Services, Xerox Education, Ann Arbor, Michigan 48106.

ERIC – The Educational Resources Information Center

Created in 1965 by the U.S. Office of Education, ERIC is the most ambitious and comprehensive program currently underway to supply the entire educational community with educational research results and other resource information. Through ERIC, any educator or educational institution can obtain selected research, development, and innovative reports on almost every educational subject.

Although ERIC is a nationwide information system using highly sophisticated information processing techniques, it is also decentralized. ERIC consists of four major interrelated components:

1) Central ERIC. The headquarters staff in the Office of Education coordinates the system and formulates overall policy for its development.

2) The network of 19 clearinghouses. Each clearinghouse, specializing in one area of education, processes

documents for announcement in *Research in Education* (RIE), ERIC's monthly index and abstract catalog, and conducts information analysis activities.

3) An ERIC Facility which merges onto magnetic tape document data supplied by the clearinghouses for *RIE*. The Facility, currently operated under contract by the North American Rockwell Corp., also provides computer, lexicographic, and technical services.

4) The ERIC Document Reproduction Service (EDRS), operated under contract by The National Cash Register Company, sells microfiche and paper copy reproductions of documents cited in *RIE*.

The catalog *Research in Education* is the principal means by which users of ERIC gain access to its store of documents. Currently, each issue lists nearly 1,000 documents processed by the clearinghouses during a previous month. The resume for each document includes the bibliographic information, abstract, index terms, and availability notice. If the document is available from EDRS, it can be ordered by its accession number at the prices cited in the resume. If it is not available from EDRS, an alternative source is given. A separate section of *RIE* contains abstracts and indexes of ongoing research projects supported through USOE's National Center for Educational Research and Development. *RIE*'s indexes–subject, author, and institutional source–are also published in semiannual and annual cumulations. *RIE* is available in many libraries and by subscription for $21 a year from the U. S. Government Printing Office, Washington, D. C. 20402.

An increasing number of school districts are purchasing ERIC microfiche for their libraries and resource centers. Microfiche is a sheet of film which contains micro-images of up to 60 pages of text arranged in rows, including an eye-legible heading for the document's number, title, author, source, and other basic information. Microfiche comes in several sizes, although most, including all ERIC microfiche, are reproduced to conform to the international standard of 105 by 148 mm. (approximately 4 by 6 inches). The main advantage of microfiche as opposed to paper copy is economy, which is realized both in initial investment and storage. The complete ERIC collection as of October 1968, for example, can be purchased in microfiche for $2,205, whereas the same collection in paper copy would cost over $50,000. The 26,350 sheets of microfiche in the collection can be filed in 30 linear feet of drawer space, or one filing cabinet; the collection in paper copy would occupy almost 600 linear feet of shelf space. A standing order to receive microfiche of all ERIC documents as they become available currently costs about $125 per month. Microfiche readers, necessary to enlarge the images for reading, are available from a variety of manufacturers for upwards of $100.

When ERIC was begun by USOE in 1965, its library consisted of 1,746 documents in the Special Collection on the Disadvantaged. Now, with 19 clearinghouses processing nearly 1,000 documents among them each month and after a number of other special collections have been issued, the volume of documents in the ERIC system numbers close to 25,000. If ERIC's usefulness as an information service is to keep pace with its growing collection of documents, educators must not only be aware of the system's products and services, they must also be properly skilled in their use.

Once the user locates a research report in *RIE*, and, upon reading the abstract, decides that a copy of the report is worth having, the final step is simple. He notes the price of the document and orders it from the ERIC Document Reproduction Service. Unfortunately, as many ERIC users have discovered, locating reports in *RIE* is not always an easy task. Most problems arise over searching through *RIE*'s subject index. The absence of cross-references and the nonconformity of many index terms to the "natural language" of the subject area can make searching haphazard and inefficient.

Aware of these difficulties, ERIC has published a *Thesaurus of ERIC Descriptors* to assist the user in conducting indepth searches. The thesaurus is especially helpful in discovering all terms that are relevant for a particular search. Each descriptor in the main section is accompanied by a list of narrower, broader, and related terms that help to define it, thus enabling the user to narrow or broaden his search by choosing a new set of terms. Synonyms and near-synonyms of descriptors are also listed, with cross-references directing the user to appropriate descriptors equivalent to his own language.

Location of compound descriptors is further facilitated by a Rotated Descriptor Display. In this section, multiword descriptors are rotated and filed under each word. For example "school law" is filed under both "school" and "law". Any multiword descriptor can thus be located if only one key word in the descriptor is known. The rotated display also reveals all related descriptors filed under each of its component words.

In addition to *RIE*, the subject indexes for each of the special document collections also conform to the *Thesaurus of ERIC Descriptors*. Thus, for any thorough searching of the ERIC system—whether for documents processed by the clearinghouses or for documents in such collections as the Disadvantaged, Historical, PACE, or Manpower—the thesaurus is a practical and necessary tool. A new edition of the thesaurus was recently published and is available from the Government Printing Office for $2.50.

In addition to reports announced in *RIE*, a number of special document collections are available through ERIC. The following collections are of particular interest to educators at the elementary and secondary levels: (1) Disadvantaged Collection—1,746 documents dealing with the special educational needs of the disadvantaged, (2) Historical Collection—1,214 reports on research projects sponsored by USOE from 1956 to 1965, (3) 1966 and 1967 PACE Collections—two sets of project proposals from both planning and operational grants under the ESEA Title III PACE program. Each collection can be purchased in microfiche from EDRS. Author, subject, and other indexes for the collections can be ordered from the Government Printing Office.

LEGAL PROBLEMS

To help educators make better use of the growing number of ERIC products and reference tools, ERIC has published a guide to its services entitled *How to Use ERIC.* This illustrated brochure explains each step the user should take to search for and order documents from *RIE* and the special collections. It also cites prices for all of the ERIC index and abstract publications. A copy can be ordered for 30 cents from the U. S. Government Printing Office, Washington, D. C. 20402.

In May 1969, ERIC launched a new periodical designed to help educators keep abreast of current journal literature in education. *The Current Index to Journals in Education (CIJE)* is a monthly catalog and index of journal and periodical literature in the field of education. Approximately 190 educational journals were indexed in the first issue of *CIJE*, and an even broader spectrum of educational literature is planned for coverage in future issues.

The *Current Index to Journals in Education* has been designed as a companion volume to *Research in Education*, the index and abstract bulletin for report and other research-related literature. Terms listed in the *Thesaurus of ERIC Descriptors* are being used to index entries in both volumes. However, no abstracts of journal articles are being prepared, nor will article reproductions be available from the ERIC system. *CIJE* is an announcement service only.

CIJE contains a main entry section, an author index, a subject index, and an index to source journals. The journal citations are arranged in the main section according to 52 descriptor categories, to facilitate browsing. These major subject groupings include such terms as administration, communication, curriculum, evaluation, facilities, finance, government, instruction, race relations, and social sciences.

Cataloging and indexing of the journals are the responsibility of the 19 clearinghouses and the ERIC Facility of North American Rockwell, Inc., which processes those journals not primarily within the scope of a single clearinghouse. Information Sciences, Inc., an independent subsidiary of Crowell, Collier and Macmillan, was awarded the USOE contract for publishing the index. Information Sciences, Inc., later plans to publish semiannual and annual index cumulations and other special editions which will be oriented toward subject specialists in the field of education.

Of all the journals that have been selected for processing, about 90 percent are educational journals that are being indexed "cover-to-cover," excluding only such items as book reviews, editorials, letters to the editor, feature columns, etc. The remaining 10 percent consist mainly of journals in fields related on education; articles in these journals are being selected on the basis of their relationship to education.

Ten journals have been assigned to this Clearinghouse for indexing, of which the following are being indexed cover-to-cover: *AEDS Journal, Administrator's Notebook, American School Board Journal, Compact, Educational Administration Quarterly, History of Education Quarterly, Journal of Educational Administration, Journal of Educational Data Processing,* and *Paedagogica Historica* (Belgium). *Administrative Science Quarterly* is being indexed selectively. Present plans call for the inclusion of some 50 law journals. These journals will be reviewed regularly and articles dealing with school law will be indexed on a selective basis. We hope to begin the selective indexing of these law journals by the first of the year.

The regular price for an annual subscription to *CIJE* is $34.00. A single issue costs $3.50. Prices for the cumulative editions have been established as follows: Semiannual, $12.50; annual, $24.50; semiannual and annual, $35.00; semiannual and annual for subscriber, $30.00.

To obtain further information about *CIJE* and to place orders, write to CCM Information Sciences, Inc., 886 Third Avenue, New York, New York 10022.

Clearinghouse on Educational Administration

Complementing the services of the national ERIC network are the more specialized services of the ERIC clearinghouses. Each clearinghouse has two primary functions: (1) it acquires, indexes, and abstracts documents for announcement in *RIE*, and (2) it publishes newsletters, bibliographies, and interpretive reviews of research studies.

In the field of educational administration, a clearinghouse has been in operation at the University of Oregon since 1966. The ERIC Clearinghouse on Educational Administration (ERIC/CEA) defines its subject area as the leadership, management, and structure of public and private educational organizations on the elementary and secondary education levels.

Within the limits or its subject area, ERIC/CEA acquires published and unpublished research reports, books, surveys, bibliographies, instructional materials, occasional papers, monographs, conference reports, and other materials. Although the Clearinghouse is particularly interested in acquiring "fugitive" materials not widely distributed by other means, its purpose is to collect and process all information of interest to school administrators, researchers, and professors. Anyone having documents relevant to ERIC/CEA's subject area should send them in duplicate to Acquisitions Librarian, ERIC Clearinghouse on Educational Administration, University of Oregon, Eugene, Oregon 97403.

Since most of the significant documents ERIC/CEA acquires are eventually announced in *RIE* and available from EDRS, the Clearinghouse is not equipped to supply copies of documents in response to individual requests. Therefore, educators who write to the Clearinghouse for information on subjects in educational administration are referred to *RIE* and other sources.

It is the second major function of the Clearinghouse, information analysis, that makes ERIC/CEA an important resource for school administrators and other persons interested in educational administration. A variety of bibliographies, newsletters, indexes, literature reviews, and other information analysis products are prepared by ERIC/CEA for its users.

UPSURGE AND UPHEAVAL IN SCHOOL LAW

Four times a year ERIC/CEA publishes and distributes to persons on its mailing list a user service report entitled *U-SERV*. *U-SERV* announces publications and other products of the Clearinghouse, lists processed documents that have been announced in *RIE*, and contains other information about ERIC and ERIC/CEA services. The Clearinghouse also publishes jointly with the Center for the Advanced Study of Educational Administration a quarterly research bulletin, *r & d perspectives*. The ERIC/CEA portion of the bulletin features reviews of literature on topics of current interest in educational administration. Collective negotiations, planning systems in education, and school-community relations are topics that have been reviewed in recent issues. If you are interested in receiving these publications, write to the Clearinghouse and request to have your name added to the mailing list.

Several bibliographies and research analysis papers are being prepared by the Clearinghouse on topics related to school law. The following products dealing with this subject are currently available from the Clearinghouse: *Bibliography on School Law Dissertations: 1952-1968*, by M. Chester Nolte; *Collective Negotiations in Education: A Review of Recent Literature*, by Stuart C. Smith; *ERIC/CEA Research Review: Collective Negotiations in Education*, by Philip K. Piele; *Administrator Techniques in Collective Negotiations: A Guide to Recent Literature*, by Philip K. Piele and John S. Hall; *Selected Bibliography on Student Activism in the Public Schools*, by John S. Hall. These and other special publications produced by ERIC/CEA are processed for eventual announcement in *RIE* and distribution by EDRS. However, until copies of the publications are available through EDRS, they can be obtained from the Clearinghouse, usually free of charge for a single copy. The Clearinghouse will supply on request a complete list of its publications available from EDRS.

Last year ERIC/CEA published a directory of organizations conducting research or service work in educational administration. The directory listed 102 organizations, including regional laboratories and research centers funded by USOE, university research and service bureaus, and independent organizations. It indicated each organization's scope of subject area, service area, publications, and policy for supplying information in response to requests. This year the directory has been updated and expanded to include more than 120 organizations. For the first time, the directory includes a new section which lists personnel conducting research in the field. Each researcher's subject area, institutional affiliation, and publications are cited along with his address for the 1969-70 academic year. Subject indexes are provided for each section. Copies of the 1969 edition can be ordered from the Clearinghouse for $2.00 each.

ERIC/CEA will soon publish two state-of-the-knowledge papers dealing with topics related to school law. *Teacher Militancy: Implications for Schools* is the title of a paper written by Dr. Richard C. Williams, Assistant Dean, College of Education, UCLA. Another paper, dealing with the legal aspects of collective negotiations, is currently being prepared by M. Chester Nolte.

MEMORIAL TO LLOYD E. McCANN

by

M. Chester Nolte
Professor of Education Administration
University of Denver

Lloyd Ellis McCann started his teaching career as a 17-year-old youth in a one-room rural school in his native Nebraska, and went on to gain national prominence as an educator, historian, and researcher in the field of school law. His untimely death on January 21, 1969 at the age of 62 unseasonally deprived the field of education of one of its most enthusiastic and energetic personalities.

Getting a degree was not easy for the rising young educator. He taught for nine years in rural communities near his home while working on his bachelor's degree from Nebraska State Teachers' College at Peru. Finally, at the age of 28 he achieved this milestone in his educational climb, and then worked his way up from teacher, to principal, and finally superintendent, while working on his master's degree from Colorado State College at Greeley. He served with the United States Army in Europe during World War II, and was awarded the Bronze Star and the Purple Heart (he was wounded during General Patton's march through Austria).

Home after 44 months' service in Europe, Lloyd was married to Ruth Fern Erickson in 1946. In 1951, he completed work on his Ed. D. degree from Colorado State College. Then followed professorships at the University of Arkansas and Butler University. In 1958, he assumed the chairmanship of the department of school administration and supervision at the University of Arizona. In 1964, he became NOLPE president, after having served on the board of directors from 1960 until 1963.

Lloyd's public achievements as well as his love of art, music, and photography endeared him to all those whom he met. His contagious enthusiasm and crusty pragmatism were balanced by an abiding faith in the worth of the individual, and a compassion that knew no bounds. His was a rich life and full, because he was doing what he wanted most to do, and that was to teach.

No clearer expression of Lloyd McCann's influence on his students can be found than a short tribute which appeared in a Tucson newspaper shortly after his death. The editorial, written by a professor who knew him is entitled *SOCIETY IS THE POORER,* I would like to share it with you *verbatim* because its language expresses so vividly the essence of the life of Lloyd McCann.

SOCIETY IS THE POORER

> A teacher's wealth is not money. It is the lives he has influenced. Last week one of Tucson's richest citizens died. He was Lloyd McCann, professor of education at the University of Arizona.
>
> His was the American success story. Born on a small Nebraska farm, he worked his way through all levels of school, receiving his doctorate at Colorado State College. He was a public school teacher, then a superintendent of schools, and then a professor at various universities before joining the University of Arizona faculty in 1958. Meanwhile he had served with distinction in combat during World War II.
>
> Dr. McCann achieved all sorts of educational honors. He was an outstanding authority on school law, received many

financial grants for his work in his field, and published numerous books and articles on the subject. He was president of the National Organization on Legal Problems of Education and a member of many educational organizations. He became head of the department of educational administration at the University several years ago.

Dr. McCann had two distinctive qualities that made hima great teacher. First, he was more than a professor of education. He was thoroughly versed in law, government, agriculture, anthropology, and other intellectual fields. For example, he published a number of articles on purebred cattle and Great Plains history. McCann deplored today's extreme specialization and fragmentation of higher education. He was in the best sense a completely educated man, virtually a modern Renaissance man. He happened to teach educational law, but his interests encompassed the entire spectrum of knowledge.

The other quality McCann had was his deep interest and faith in students. He was more than a good classroom teacher. He spent much of his time advising students on all levels, taking particular interest in graduate students. He placed many of them in positions throughout the country. Former students by the hundreds would return to Tucson to consult with him about moving to other positions.

He was indeed rich.

Dr. M. A. McGhehey approached Dr. McCann in November 1968 with a request that Lloyd serve as editor-in-chief of the project to revise NOLPE's first yearbook, LAW AND THE SCHOOL SUPERINTENDENT. However, before this assignment could be carried out, Lloyd's health became such that he could not work on the project, although he was enthusiastic about it. In recognition of his signal contributions to the field of educational law, and to this organization, the NOLPE Board of Directors unanimously directed that the volume, which will appear in 1970, be dedicated to the memory of the man who would have been its editor-in-chief had he lived to complete the work. Although that privilege was denied him, Lloyd's memory will live on in the project which he wholeheartedly supported, that of interpreting the law to beleaguered superintendents, who, like himself, expend their lives unselfishly in the interest of their students.

TRIBUTE TO ROBERT L. DRURY

by

Dr. Roger M. Shaw
Professor of Educational Administration
Kent State University

You are in Drury Country. Seven months ago, to the day and almost to the very hour, Robert L. Drury was struck down by an apparent heart attack in this city. He died with his boots on and riding the range as was his wont and duty. His host on that Saturday morning, coincidentally as it is our host at this convention, was John Carroll University. He died in the middle of a speech on some of the current concerns in Ohio school law.

Dr. Robert Drury was legal counsel during most of the second half of the twentieth centry to the Ohio Education Association, and in the earlier days this was an extraordinary position. He was full-time, salaried, headquarterly officed and adviser indirectly and sometimes directly to almost 100,000 educational operatives in Ohio.

He regularly sat, *amicus curiae,* at the elbows of attorneys who were representing OEA members. When Bob Drury walked into Ohio courtrooms during schoollaw cases, there was a kind of hush, and the name, *Drury,* quickly and quietly opened doors to judges' chambers to the end that justice was done with expedition. Lesser legal lights, like some of us from Ohio in this room, could feel secure in the knowledge that, when we were really stumped, Bob Drury could help us.

He was a NOLPEan from its founding. I remember the occasion at Duke University when he became a charter member by passing a dollar to "Mother Madaline" Remmlein over a decade and a half ago. Of his many services to NOLPE, perhaps his greatest was his editorship of the first volume in NOLPE's "Legal Problems of Education" series. It bore the title: *The Law and the School Superintendent.* Contributors to that useful work, now out of print but about to be revised and updated by NOLPE, are seated in this room this noon. Coauthor of several other school-law works, his indisputable claim to fame, however, is *Drury's Ohio School Guide,* W. H. Anderson Co. (1954, 1960, and 1966),--some 1000 pages of which 250 are textual, narrrative commentary on the body of school law in Ohio amply footnoted and bieannially pocket-pieced to the constitutional, statutory, administrative, and case law which in authoritative documentation comprises the balance of the tome. I have been so sanguine about this book and its author as to deem it almost comparable to another set of commentaries--Blacksone's.

Robert Drury wouldn't want us maudlin in these fleeting and few moments of tribute to a great NOLPEan. In his own matter-of-fact spirit, therefore, I simply say that to us in Ohio he was a living legend before he died and that the seven months and three hours since his untimely death have been, in many moments of mourning, a personal and professional void.

TRIBUTE TO DR. NEWTON EDWARDS

by

Walter L. Hetzel

Superintendent,
Ames, Iowa

Eighty years ago at Carthage, North Carolina, a baby boy was born. Three weeks ago at Liberty, North Carolina, which is near Carthage, the man who achieved greatness in school law and who came from that baby boy died as he was being taken to the hospital because of a heart attack. He was living with an older brother and sister at the time. He has a son who is in govermental work in Washington, D.C.

This man, Newton Edwards, was great to us NOLPEans because he was the first to see the importance of school law, particularly as it relates to the courts. He very carefully researched the law, organized it, and wrote about it in his great book *The Courts and the Public Schools.* Following the early 1930's and many years thereafter this book was the standard textbook in school law courses throughout the United States. I studied it in a school law course at the University of Iowa in 1934. Many of you, as either students or teachers, also used this book or a later edition of it. It was and is an extremely accurate and well written book.

Newton Edwards taught at the University of Chicago for approximately thirty years before retirement. Following his retirement he taught at the University of Texas, University of South Carolina, and most recently during summer sessions at Duke University.

NEWTON EDWARDS

Newton Edwards was not only a scholar and a writer but a humble, kindly man with a keen sense of humor and who had the touch of the master teacher. He influenced many competent young people to make school law one of their specialties. This room is filled with such people and the second generation of such people. Dr. Ed Bolmeier is an example of the first generation and Dr. Evelyn Fulbright of the second.

Many of you will remember the NOLPE meeting at Louisville where Dr. Newton Edwards was honored by being made a Colonel, was given the key to the city, and was made an honorary life member of NOLPE. You also remember the interesting, thoughtful address he gave to us at that time. It was filled with keen humor.

I can pay no higher tribute to Dr. Newton Edwards, nor illustrate it better, than by showing you a picture of him proudly standing between two of his boys who are to receive special awards at our banquet tomorrow night. These two are Dr. Lee Garber and Dr. Ed Bolmeier. This picture was taken at a Duke University School Law Conference. Dr. Newton Edwards attended every Duke School Law Conference since the first, except the most recent one. He will be sorely missed there in the future. However, his influence will continue to be there, at future NOLPE conferences, in college classes where school law is taught, and out in the field where school law problems arise and must be solved. The school law seeds he planted will continue to flower. And as I say this I am reminded of Dr. Anne Flowers, a second generation protege of his.

THE IMPACT OF LEGAL AID PROGRAMS FOR THE POOR ON THE OPERATION OF PUBLIC SCHOOL DISTRICTS IN THE UNITED STATES

by

Gregory B. Taylor
Attorney, Cleveland, Ohio

The title of our subject for this afternoon is "The Impact of Legal Aid Programs for the Poor on the Operation of Public School Districts in the United States." There are a number of different possibilities one might consider under this topic. The best thing for me to do, since I have no way of knowing what your scheduled speaker would have covered, would be to go through a few topics. Members of the panel and some of the listeners will mention things that are of concern. Then we can enlarge upon these things in the session that follows.

When we speak of Legal Aid Programs for the Poor, what we really ought to bear in mind is that this whole field has been revolutionized in the last two or three years in this country because of the impact of the OEO War on Poverty. Under this program, commencing about four years ago under the Johnson administration, the so-called neighborhood legal service programs were launched in all of our major cities, many of our smaller cities, and in some of our rural areas in an effort to provide legal service to the poor in an intensive way. The old privately funded legal aid societies were entirely unable to provide intensive service, relying as they were on very limited funds and staff.

Our situation here in Cleveland is as good an example as any, and the one with which I am most familiar. Just a few years ago we had only one Legal Aid Office located in the center of the city. This one office could serve a very limited clientele who had to find their way down to the center of the city, into an imposing building, and up to the office in order to get the assistance they needed. Obviously in most cases the attorneys were unable to provide more than a very limited kind of legal service, involving very little intensive trial work or anything of that nature.

With the onset of the Legal Service Program funded largely from the OEO we now have ten offices in Cleveland, located throughout the so called target poverty neighborhoods. The offices are of the store front type which the clients can easily find and relate to on a basis of the neighborhood in which they live. The clients need not go through the ritual of going into the middle of the city which many such clients would rarely, if ever, do. This has obviously psychologically placed legal assistance directly within the reach of thousands and thousands of low income persons in our major cities in a way that it was never before possible. Furthermore, our enlarged staff, which now consists of approximately full time lawyers, enables us to handle a much larger case load, and obviously to handle it much better. In theory, although not always in practice, the staff lawyer can handle a case with the kind of attention that a private attorney would give his client.

The area that I happen to be in is a further indication of what has happened as a result of this federally funded legal service program. I specialize in a so-called area of "law reform"–a concentration on efforts to actually bring about basic changes in our legal system partly through utilization of constitutional theories. The United States Constitution challenges certain private practices, for example, in the consumer-landlord field and perhaps even more importantly, practices of our government and our public bodies.

The administration of public welfare is, perhaps, the best example, in which a tremendous amount of litigation has been going on over the last two or three years as a result of these legal service programs. As a result, offices have been set up to specialize in the handling of this kind of case and the bringing of test cases into Federal Court to challenge on constitutional and statutory grounds certain state laws or regulations in the administration of public welfare. Other areas related to this are the areas of education and of health. There are other areas besides these, but these are the three that I think commend themselves to our attention most under the present legal service program.

A number of interesting developments have taken place in the educational field; that is, the area of law affecting public school students and the administration of public education. This is an area that is very much in its infancy. We are just beginning to have some ideas as to how to stir this thing up and create lots of problems for lots of people. There are a few precedents already on the books now which suggest the direction in which some of these efforts are taking us. I might put these under certain categories. Rights of public school pupils, is one of these areas. Another area is that of related educational services. What comes to mind is the effort that has been going on in many places today to bring about improvement or expansion of our National School Lunch Program. This is not specifically an educational problem, but it is certainly related to the administration of our schools. A third area is the equality of educational opportunity. Each of these three areas has enough going on in it that I think each deserves some consideration. Also enough has happened in these areas to suggest in what direction they may be going.

Student rights is not a brand new idea. It is really a kind of a civil liberties area if you want to think of it that way. And, of course, it is a particularly sensational area. It gets lots of newspaper publicity. When we think of student rights the average man in the street is likely to think of demonstrations and riots on college campuses. I didn't have anything particular in mind, although here in the city of Cleveland we worry about what kind of buttons people wear and whether they have mustaches. These particular cases have been in court here in our community but they are not cases brought by legal service programs for the poor. However, there are related areas that do come under the category of legal service for the poor which are in the area of student rights and this is particularly true in the matter of schools suspension and expulsion rules.

One comes immediately to mind. You may be familiar with the Madeira case in New York City. It had to do with whether or not a school rule which provided for the transfer of a student from one school to another as a result of certain disciplinary infractions required a right to counsel for the student who was subjected to this kind of discipline. The question was whether or not the student could take lawyers to a suspension or disciplinary hearing to determine whether the student should be transferred to another school; did that student have a right to have attorneys present during that hearing process? In this particular case, the student did not have the right to have an attorney present because, although disciplinary, the hearing did not threaten the student with any loss of important rights. The worst that could happen to him was to be transferred from School A to School B.

Without dwelling at great length on that particular issue of law, it is an illustration of the kind of questions which in the student rights area are being pursued by some of our legal service programs. Is the receiving of an education an interest or a right of sufficient importance to call for the due process that we tend to associate with property rights or other kinds of civil rights? I think the question itself is some what rhetorical. In our society we are beginning to recognize what we have never recognized before—that the right to receive one's education without arbitrary governmental infringement or interference is a right of substantial proportions which comes under the kinds of protection that have tradionally been called due process, particularly under the fourteenth amendment to the United States Constitution which affects state action. As you know state action means more than just what the state does. It means whatever any public officer does, acting under color of law, whether it be a school board or the personnel of the school district.

Another area of student rights problems which we have in this community is the thorny issue of school district residence requirements. I think this area is going to receive continuing attention in the courts. Our suburban school districts, as you are well aware, are feeling very insecure these days about the spilling over of inner-city problems into their sanctified precincts. Some of our suburban communities that are undergoing racial change seem to be very hard and fast about the way in which they enforce their residence rules for attendance of the school. Unless you are a bona fide resident of the community, you must pay tuition to attend the public schools or be excluded.

Obviously the law of the different states vary on this. In Ohio there is a statute that covers this matter, but it has not been construed to fit all the factual situations that may arise. By and large in this state, we rely on opinions of the Attorney General of the State of Ohio for much of what goes for the law in this area. However, our attorneys would like to get some cases into the courts.

I have a particular case in mind. The question is, what is bona fide residence for school purposes? Let me give you a fact situation that happens to be in our office today. A girl was brought into juvenile court here in Cuyahoga County for being a runaway, for being delinquent, for running away from home. Before her case come to hearing, the probation officer and the attorney for the girl discussed the case and concluded that this child had a very unfavorable home situation in the inner-city area in the sense that the parental situation was far from satisfactory. She had a very responsible aunt and uncle, a married couple, living in one of our suburban communities. It was thought that the best thing possible for this child would be to live for a while with her aunt and uncle in hopes that the situation at home would either improve or some permanent arrangement could be made for this child. The child ended up living with the aunt and uncle in a very favorable family situation and just several doors from the high school in that suburban community. When the child attempted to enroll in this high school she discovered that she was not considered a resident of this community and therefore would be forced to pay tuition. She is faced with a very difficult dilemma. The only way to avoid tuition is to go to the school in the neighborhood in which she lives, which is five or six miles from where she now lives. She has to take three buses, requiring about an hours travel each way. She has to travel after dark in the very dangerous parts of the city in order to get home from school. In the name of our sanctified residence requirements, I submit, the child is being deprived of an education. However, I don't know what the courts will eventually say about cases like this.

Let us talk a little about the area of related educational services; in particular, the school lunch program. A couple of years ago one of our law reform projects located in New York City became interested in this area as an overall attack on the problem of hunger in the United States. There are a number of government funded programs for combating hunger. The most wide spread is the Federal Food Stamp Program by which the Department of Agriculture makes it possible by grants to the State for persons on welfare and others of very low income to stretch the buying power of their dollars for food. Other programs are Food Commodity Distribution Programs which some of our rural people find very important just to keep body and soul together. A third is the meal program in our schools, both lunch program and breakfast.

Unfortunately, these programs like most federal programs for the poor have been a great disappointment to those on the receiving end. They may look good on paper but by and large they suffer from gross inadequacy. Many legal analysts feel that the inadequacy really goes to a violation of the federal intent and the requirements for the administration of the programs. The case I have in mind is a problem in Cleveland.

Cleveland is not typical. There is nothing about the Board of Education of Cleveland or the County Welfare Department here that should set them apart as bad examples particularly. Cleveland suffers from the same problems that all of our metropolitan areas do, either a lack of funds or an unwillingness to devote funds to the needs of poor people. So one gets into a "buck passing" situation where the city says it is the county's problem and the county says it is the School Board's problem and the School Board says it is somebody else's problem. Nothing or very little gets done about it.

We do have a school lunch program in the city of Cleveland, but unfortunately up until now only a very small percentage of our elementary schools offered the program. Although the program's original intention was to take care of the needs of poor children wherever situated, the practical implementation has been extremely minimal, particularly on the elementary school level.

There is also the problem of stigmatizing those children who do have access to the program. In some parts of the country children are made to use a separate lunch room or to eat at a separate time or to perform certain kinds of work in return for their lunch in such a way that obviously sets them apart. In Cleveland the recipients of these lunches are required to use an identification card when most of their peers use cash. Practices of this kind stigmatize.

There are test cases in some cities raising the issues before the courts as to the legal requirements for the administration of these programs, possible deprivation of constitutional protection, or violation of statutory requirements. As you can see this gets into some very complex issues of law and administrative agency regulations. The deeper you get into these problems, the more complex they seem.

The third area and maybe in the long run the most important area in which legal challenges are being brought and which affect the operation of our schools is the area of equal educational opportunity. We have just seen the top of an iceberg. You are aware the U. S. Supreme Court said that racial segregation is inherently unequal. This matter came to a head just within the last few weeks with the Supreme Court's order to school districts in the State of Mississippi to desegregate. Now our legal service programs are not specifically concerned about racial problems as such. You might think that would be one of our chief issues, but by and large the populations with whom we deal are not involved in racial segregation, at least not in the Cleveland area. But the problem of educational quality and equality leaving aside race is very much with us.

First what is the legal definition of a quality education? Secondly, what are the constitutional requirements of providing equal opportunity for all children to receive a public education? These two questions are going to be in the courts and are going to produce I am sure, eventually revolutionary results in the administration of public education.

Two or three suits have at least begun to raise some questions if not give the answers. Many of you probably know about the case of Hobson v. Hansen in the District of Columbia. This was a follow-up suit to fully implement the requirements of the Supreme Court decision in 1954 for complete desegregation of the public schools. The court, looking realistically at the situation in Washington, D. C., could see that nothing very practical in the way of desegregation is going to be accomplished any more within the District of Columbia. The school population in the District of Columbia is approximately ninety-three percent black at present.

However, the court had a lot of interesting things to say about what equality ought to be required within a school district. It threw out the notion of a token concept of equality and suggested that if you can't produce basic racial integration within the District of Columbia, you must see that all school children receive a meaningful equal education. Education must be equal in terms of such things as how much money is spent per pupil in the schools, what kind of facilities each school has, and the teachers' salaries. The court was also very hard on the track system as administered in the District of Columbia. Lots of very thorny and difficult and revolutionary legal theories came out of that case.

Whether they will be applied widely in other school districts we have yet to see. We might as well face the fact that the drift of judicial opinion and the law in this area is to require more and more rigorous notions of basic equality within a school district in every possible facet of the educational process.

The educational process is considered more broadly in the case that was filed in the Federal Courts last year in the State of Illinois, McGinnis v. Shapiro. This case raised the question of whether school financing schemes deny equal opportunity to those students who are located in districts where a relatively small amount is spent per pupil on the educational process. The theory of the case is that education is essentially a state, rather than a local function. There is good constitutional basis for that principle throughout the United States. In Ohio our public educational system is set up under the State Constitution and is the responsibility of the State Legislature, not the local school district. The local school district is just a convenient way of delegating the authority of the State. The theory of the McGinnis case was that since the State Government is responsible for public education throughout the state, it must account for the fact that only $400 per pupil is spent in some parts and over $1,000 per pupil is spent in other parts. Isn't that difference an obvious denial of equal educational opportunity on the part of the state? This is probably a sound theory, but it just didn't win in that particular case. Surely it's obvious that $1,000 compared to $400 is a gross inequality, but what are you going to do about it, short of having the State take over the whole process and have direct taxing and funding by the State rather than by the local school district? It seemed to the Court that that scheme was impractical. The Court was also not entirely convinced that absolute cash equality was required by the Constitution. I think the Court suspected that maybe equal educational opportunity is a more profound issue than just how much money is spent per pupil. I am sure the Court is right on that. Anyway that case never got anywhere and the denial of the suit was affirmed by the U. S. Supreme Court and that is the end of that case.

However, there are others waiting in the wings. They will be more sophisticated suits based on some of the same principles. As long as the State is responsible for educating all pupils then the obvious inequalities must be remedied one way or another. I suspect we are going to get some courts doing something about it in the months, or at least the years ahead.

One other area of litigation that has really gotten nowhere and may also have some implications is the litigation that arose over the Ocean Hill-Brownsville fracas in

New York City. This is the area of community control and school decentralization. A suit was brought there on behalf of the Ocean Hill-Brownsville group against the State of New York and the School District. It was argued that there was a positive duty to decentralize the schools and provide for community control because that was the only way one could get educational opportunity for slum children. It was a denial of equal protection not to have decentralized and community controlled schools. The court rejected that principle but it gives you some notion of the kinds of theories and arguments that are now being pressed on the courts.

THE IMPACT OF LEGAL AID PROGRAMS FOR THE POOR ON THE OPERATION OF PUBLIC SCHOOL DISTRICTS IN THE UNITED STATES

by
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In August, 1964, the Economic Opportunity Act became law in the United States. It included, among other provisions, a section establishing the "community-action-program" approach to dealing with the problems of poverty. This approach was characterized by an all-out attack in the *local* community against poverty. The law contemplated that all of the resources of the local community were to be brought to bear to help eradicate the plight of the poor. The generalship of this part of the "war on poverty" was to be shared by poor persons who also were supposed to be involved in the actual carrying out of the projects. Under the law, the "community action program" projects were financed mainly by federal funds administered by the newly created United States Office of Economic Opportunity.

One of these "community action programs" slated to receive substantial federal funding as part of the frontal assault on poverty in our nation was the legal services program. The rules for the establishment of the "community action program" of legal services were clearly set forth in a talk by Theodore M. Berry, Director of the Community Action Program of the Office of Economic Opportunity to a meeting in Washington, D.C. in June, 1965, of 500 lawyers and other persons involved in legal aid work throughout the country.[1] This meeting had been called by the Attorney General of the United States and the Director of the Office of Economic Opportunity to discuss the role of the lawyer in the implementation of the Economic Opportunity Act. The rules for "community action program" legal services were:

> 1. The poor should receive legal services equivalent to that received by persons who can afford to pay lawyer's fees;
>
> 2. Legal representation of the poor should be aggressive and dedicated in nature;
>
> 3. The legal services program should be as independent of outside influence as possible;
>
> 4. The legal services program should be willing and free to handle the most controversial cases;
>
> 5. The legal services program should be broadly representative of the community and the groups to be served should be partners in the control and operation of the program.

Within the framework of these rules, Mr. Berry said that the "community action program" legal services program should provide a full range of service. He specifically identified:

> . . .government abuses whether they involve welfare, *the school system* or public housing.[2] (emphasis added)

as an integral part of the "full range of services" to be offered by Office of Economic Opportunity financed lawyering. It is to the *second* part of that triumvirate which this paper is addressed.

The federally funded legal services program operated under the Economic Opportunity Act has been in existence just over five years. The question which arises is: What has been the impact of these legal aid programs for the poor on the operation of public school districts in the United States? To answer that question adequately it is necessary to look briefly at the history of the legal aid program for indigent persons in the United States. Since the question is framed, as a practical matter, exclusively in terms of the civil law, we will *not* concern ourselves with attempts to provide legal defense for the poor in criminal law matters.

Legal aid programs providing legal counsel and representation in civil matters for persons who were financially unable to retain an attorney have a long, rich history in the United States. Characteristically, it was a charitable services activity wholly funded by contributions from the local community. Typically, the local organized bar, and wives of local lawyers, provided the leadership in money-raising efforts to finance the legal aid program. The local bar also provided a reservoir of public spirited lawyers who would accept indigent clients on a volunteer, no-fee basis. These lawyers usually were the younger members of the bar who not only had more time because of their relatively small practice in their early years to devote to legal aid referral clients but also because they were eager to develop the broadest possible experience in the general practice of law.

Legal aid funds and the time of volunteer attorneys were very limited. These two factors, in combination with the prevailing view that legal aid societies generally limit their legal assistance offerings to persons who had legal problems which could be solved at the trial court level, severely restricted the nature of the lawyers' caseloads in legal aid societies. Some areas of the civil law, such as matrimonial cases, were entirely excluded from legal aid programs unless there were compelling reasons, such as the danger of injury to a wife who could not get a restraining order to keep a derelict husband away, to change the general policy.

Moreover, a dominant factor in the establishment of policy governing legal aid programs was the local bar, which usually was conservative in nature and, therefore, exceedingly loathe to visualize the legal aid program as anything more than a defensive legal charity. That is, legal aid was structured to provide immediate legal solutions for worthy persons caught up in identifiable legal snares. Since it is improper for a lawyer to advertise, the legal aid program was not well known among the poor, who were the very persons it was supposed to assist. And, finally, the definition of the level of poverty a prospective client must have sunk in order to qualify for legal aid was very low.

The picture that emerges of the typical legal aid program for the poor in the larger cities of the United States prior to 1964 is a small law office staffed by one or just a few lawyers who practiced under severe limitations in the freedom of choosing clients and in the methods of representing them before administrative or legislative bodies and at the appellate court level. The Economic Opportunity Act of 1964 changed the picture drastically by pumping millions upon millions of dollars into free legal aid services for the poor and requiring that at least a portion of that money be spent on "law reform" activities.

Legal aid societies throughout the United States were placed in a dilemma in 1964 by the Economic Opportunity Act. If they applied for federal funds as a community action program to combat poverty by providing legal services to the poor, they had to change their philosophies and methods of operation drastically. That is, if their applications for federal funding under the Economic Opportunity Act were to be approved, they must take action to involve the poor on their boards of directors, agree to aggressively represent the poor in even the most controversial cases, employ poor people wherever possible, act more independently of "outside influences," establish a more liberalized definition of what constitutes "poverty" in order to qualify for free legal aid, and do a much better job of acquainting the poor with the free legal aid services available under the legal aid program. In return for assurances that these conditions would be satisfied, a legal aid society could profoundly expand its program of legal assistance to the poor. The alternative to the acceptance of these conditions by the established legal aid societies was the creation of a new organization in the local community designed to provide free legal services as a "community action program" component under the Economic Opportunity Act.

Communities differed in their responses to the carrot of federal funds held before them by the Economic Opportunity Act of 1964. In some cities, the legal aid society became the "community action program" legal aid project, in other cities the legal aid societies refused to alter their historic policies and new agencies were born to carry out the "community action program" legal services, and in yet other cities, legal aid societies shared "community action program" funds under the Economic Opportunity Act of 1964 with newly created legal service agencies.

Regardless of whether the legal services funded by the Economic Opportunity Act of 1964 are provided at the local level by old-line, established legal aid societies or by newly created agencies, a significant part of their program is "law reform."

Under the "community action program" approach of the Economic Opportunity Act of 1964, for legal aid to the poor, the term "law reform" means that, in addition to handling the usual types of legal problems, the legal aid society also should carefully select for special treatment those unusual cases which, if resolved in favor of the legal aid client, could have a significant impact on the lives of the poor. These "unusual" cases should have community-wide significance, and would include:

> . . .such matters as test case litigation, the reforming of administrative agency practices, the development of economic programs, or the representation of groups (of poor people).[3]

That "law reform is the thing" under the Economic Opportunity Act of 1964 is illustrated in the conditioning of EOA federal fund grants to legal aid agencies on the development by such agencies of a definite plan which:

> . . should include a list of the issues that the program feels have law reform significance, and indication of the relative importance of each of these issues, the intended strategy for handling each of these issues, and the priority to be set between the handling of these issues and the handling of divorce and other routine cases. A checklist should also be developed for the ease of the staff so that they will immediately recognize the law reform issues. Finally, the program must develop a plan for using volunteer lawyers to assist in law reform. . .[4]

The object of "law reform" is to remake the law in such a way that the civil and human rights of poor people are given a full and fair consideration and to prevent the law from being a tool of oppression and thwarting the socially desireable aspirations of poor people to share more fully in the material rewards of personal industry and productivity. It is a commonly known fact that seeking education is the single most important endeavor for poor people who are attempting to better themselves. It is perhaps belaboring the point to state that education is of significant "community-wide significance" to the poor. Since the poor people of today depend primarily on the public schools for their education, and the public schools are administered under state laws and local school board rules and regulations, it is hardly surprising that the local public school would be a natural target for "law reform."

To determine the extent to which "law reform" by federally financed legal aid agencies has affected the operation of local public schools, I wrote to the directors of more than eighty legal aid entities throughout the United States last August asking them about their interaction with the local public schools of their communities. Over fifty responses were received. In a significant number of cases, there had been considerable dealings with the local public schools on the part of legal aid entities in our nation. The areas in which local public schools and legal aid agencies dealt with each other may be divided into at least nine separate areas:

1. student discipline;
2. use of federal funds by local public schools;
3. school bus transportation;
4. racial integration of pupils;
5. school district organization and management;
6. school tuition;
7. application of the "one-man, one vote" principle;
8. state aid to local public schools;
9. educational activities about the law.

Let us consider some representative examples of cases under each one of these categories:

I.

STUDENT DISCIPLINE

Probably the most numerous interchanges between the local public schools and legal aid agencies involve the discipline of pupils. School administrators and teachers are very concerned about their capacity to control discipline in the schools. They view themselves generally as sound people who are specially equipped by professional training and specially licensed by State law to mete out punishment to errant pupils as their discretion tells them is appropriate to maintain control over the situation. They look upon themselves as "second parents" of pupils and believe that to be successful they need the widest possible flexibility in dealing with their pupils who may be disciplinary problems. They tend to view any attempts either to limit their exercise of reasonable discretion in punishing pupils or to formalize their approach to the misbehaving pupil through the application of a judicial concept like "due process" as efforts which frustrate them in maintaining good order and discipline in the schools. As valid as this viewpoint may be, the fact is that the law is changing. And this change is working to erode the power of school administrators and teachers over their young charges.[5] This fact has not gone unnoticed by legal aid lawyers who, in the spirit of "law reform" are continually attempting to expand the rights which the law would recognize that children have with the resultant narrowing of authority of school people. An example of this kind of case is *Anderson v. Independent School District No. 281.* This matter was recently considered by the Hennepin County, Minnesota, District Court as a result of a lawsuit filed by the Minneapolis Legal Aid Society.

In that case, the plaintiff was a sixteen year old high school student who was suspended from school on January 10, 1969, for allegedly having committed the "offense of smoking." In the complaint for injuctive relief, the attorneys for the Minneapolis Legal Aid Society claimed that (1) their client had a right to a hearing on his suspension under the due process clause of the Fourteenth Amendment to the U.S. Constitution, (2) the "no smoking" rule was only sporadically enforced by school authorities and that the selective enforcement of the rule against young Anderson was a denial of the equal protection of laws, (3) the punishment meted out to young Anderson was "grossly disproportionate to the offense," (4) a school district is "precluded from issuing regulations that would deny the statutorily guaranteed right to a free public education for trifling offenses," and, (5) effectively, the only valid test for the adoption and enforcement of a rule regulating pupil conduct is class disruption or undermining of discipline in the schools. The District Court ordered that young Anderson be reinstated and the school district has appealed the decision.

In New York City, in *Knight v. Board of Education,*[6] the "Community Action for Legal Services, Inc.," brought a lawsuit in the U. S. District Court for the Eastern District of New York in 1969 which resulted in the reinstatement in school of a large number of suspended students. And in San Francisco in December, 1967, a federally funded legal aid agency represented a pupil who had been suspended from school as a result of having been arrested on suspicion of throwing a fire bomb in a school hallway. The pupil claimed he should have had a hearing before his suspension from school. The California Supreme Court denied a petition for a hearing and the school district's action of suspension was allowed to stand.[7] The question of whether or not a student who is the subject of disciplinary proceedings in a public school is entitled to a hearing probably is not settled to the satisfaction of all lawyers in California.[7a] The "Alameda County Legal Aid Society" filed suit in January, 1969, to require the Oakland city public schools to hold "procedurally adequate hearings" in pupil disciplinary cases.

Notwithstanding the actual litigation which occurs in the area of pupil discipline, most of the efforts of legal aid agencies in dealing with school authorities in pupil discipline matters involve out-of-court negotiations with school officials or appearances at suspension hearings. It is the unusual case that goes into Court. Probably, every legal aid agency in the nation has had such informal dealings with local public school officials, ranging from "excessive suspensions," which, when such practice:

> . . .has been called to the attention of school authorities, it has been terminated immediately.[8]

to school authorities in a poverty area junior high school with a high pupil drop-out rate:

> . . .going overboard in their disciplinary measures.[9]

It is indeed a new era when school children who are the subject of disciplinary action in a school become represented by attorneys. Part of the reason was eloquently expressed in *Brown v. Board of Education,* 347 U. S. 483 (1954) at p. 493:

> Today, education is perhaps the most important function of state and local governments. . .It is the very foundation of good citizenship. Today, it is the principal instrument in awakening the child to cultural values in preparing him for later professional training and in helping him to adjust normally to his enviornment. In these days it is doubtful that any child may reasonably be expected to

succeed in life if he is denied the opportunity of an education.

But the *other* part of that reason is attributable in great measure to the expanded services of federally financed legal aid services to the poor.

II.

USE OF FEDERAL FUNDS BY LOCAL PUBLIC SCHOOLS

The U. S. Government has provided millions of dollars in federal aid to local school districts to pay for the special educational needs of children from poverty families. Title 1 of the Elementary and Secondary Education Act of 1965 specifically recognizes the special educational needs of children of low income families and provides money:

> . . . to expand and improve their educational programs by various means . . . which contribute particularly to meeting the special educational needs of educationally deprived children.[10]

Specific guidelines are established to assist local schools in determing who the poor people are who are entitled to educational assistance under the law. These guidelines are somewhat subjective, however, and their application in local school districts is complicated by neighborhood groupings and census tract data. The "Alaska Legal Services Corporation" in Anchorage, convinced that:

> many school districts throughout the country have abused the Title 1 (Elementary and Secondary Education Act of 1965) program due to their desire to employ the funds to offset local expenses rather than to fight the adverse educational effects of poverty.[11]

helped induce the local school district to change its plans for the expenditures of such funds in a "substantial" way.

In St. Paul, Minnesota, the "Legal Assistance of Ramsey County, Inc.," assigned one of its staff attorneys to work with school districts in Ramsey County:

> . . . to implement a free hot lunch program[12]

under the federally financed school lunch program. One of the principal efforts of this legal aid attorney was:

> . . . working out procedures (with school district personnel) to insure that the students participating in the program would not be treated differently than the students who were able to purchase hot lunches.

Two lawsuits in the area of pupil lunches under federal legislation, one against the Kansas City, Kansas, School District No. 500 and the other against the Detroit, Michigan, city school district were recently filed by Ronald F. Pollack, Staff Attorney of the "Center on Social Welfare Policy and Law," New York, New York.[14] These lawsuits, filed in the federal courts, sought declaratory and injuctive relief to enable "needy school children":

> . . . to receive their school lunch entitlements in conformity with Federal constitutional, statutory, and regulatory law.

Essentially, the *complaints* filed in both cases allege that poor children who are pupils of the defendant school districts are entitled to free lunches under the federal lunch program without having to work for them as a student cafeteria worker and regardless of whether or not they live in a minimally defined target area of poverty.

LEGAL AID PROGRAMS

The "free lunch" lawsuit also is being contemplated by the "Law Reform Unit-Legal Services Program" of Baltimore, Maryland.[15] The "Atlanta Legal Aid Society, Inc.," fulfilled a watchdog function on its two local school districts (Atlanta and Fulton Counties) concerning their implementation of the federal school lunch program and:

> . . . concluded, fortunately, that both school districts' plans do comply with federal problems.[16]

Instead of going to court, the "Economic Opportunity Legal Services Program, Inc.," of Miami, Florida, appeared before the Dade County school board on several occasions. As a result of efforts by the legal aid attorneys, the "Dade County Board of Public Instruction" took two significant actions:

> 1. the application form was simplified to eliminate irrelevant and embarrasing questions, and
>
> 2. qualifications for the program and objective standards of administration were made uniform on a county-wide basis.[17]

Not content with this, the legal aid attorneys are pressing the "Board of Public Instruction" to strengthen its procedures for administering the federal free lunch program to insure that all children qualified to receive program benefits actually receive them.

The theory underlying the school lunch lawsuits is not only that poor children have a legal right to such lunches but that proper nutrition is indispensable to the successful learning process. The legal aid agencies, on behalf of their poverty clients, are striving for acceptance by local public officials of responsibility for insuring that, at least while the children are at school, *all* children receive the benefit of a good diet.

III.

SCHOOL BUS TRANSPORTATION

In an interesting case involving school bus transportation of Indian pupils whose parents could qualify for legal aid from the San Diego County Legal Aid Society, Inc., California, the legal aid society filed a legal action against a county school district.[18] The purpose of the lawsuit was to require the Escondido, California, Union High School District to provide school bus service between the Rincon Indian Reservation and the local high school. The legal theory was that failure to provide school bus transportation deprived the Rincon Indian children from receiving equal opportunity in education. The school district subsequently made provision of transporting the Rincon Indian children between the reservation and the high school and the lawsuit never pursued.

The "Legal Assistant of Ramsey County, Inc.," is now considering a lawsuit:

> . . . which would involve the denial to students living in St. Paul of any form of free public transportation which is available to out-of-state students.[18a]

The subject of transporting children to and from school is certainly a matter of considerable significance to the community. Therefore, it qualifies easily as an innovative "law reform" activity of a legal aid society which affects the local public schools.

IV.

RACIAL INTEGRATION OF PUPILS

A lawsuit seeking to establish racial balance among the pupils of an elementary school in the Richmond, California, public school district was filed on October 16, 1969, by the "Contra Costa Legal Services Foundation."[19] Three of the five school board members of the Richmond public school district voted *not* to answer the complaint. The trial court then accepted all the allegations in the legal aid society's complaint as true and:

> . . . ordered the school board to desegregate the school that is the subject of this action and to adopt a proposed plan of desegregation which was to be filed with the Court within thirty (30) days. . .[20]

Thus, a legal aid society was the attorney in a legal action which produced the first judical order requiring a local public school district in California to develop and implement a pupil racial desegregation plan. However, it should be noted that the pupil desegregation plan was later changed from its origianal format and such change was approved by the Contra Costa County Superior Court. Without hesitation, the "Contra Costa Legal Services Foundation" promptly filed a petition for writ of mandate against the Superior Court in the California Supreme Court. That action was filed in August, 1969, and is now pending.[21]

In an imaginative twist to school pupil racial litigation, the "Legal Aid Society of Albuquerque," New Mexico, filed a lawsuit against the New Mexico State Board of Education and the Albuquerque Board of Education recently on behalf of Mexican-American poor people.[22] This federal court action seeks a mandatory injuction directing the New Mexico public schools:

> . . . to provide instruction in Spanish history, language and culture on a basis of equality with American history, language (English) and culture.[23]

Additionally, the suit also seeks relief from alleged discriminatory practices, including "ability grouping" of pupils by tests which are not designed for Mexican-American children, rules improperly inhibiting freedom of speech and the right of assembly of Mexican-American children and stationing police and other law enforcement officials in large numbers in and around public schools where Mexican-American children are enrolled.

Thus, the legal aid agencies now qualify as contenders in sensitive areas of "law reform" with old-line law reformers such as the "National Association for the Advancement of Colored People" and the "American Civil Liberties Union." The big difference, of course, is that federal funds finance the legal aid agencies.

V.

SCHOOL DISTRICT ORGANIZATION AND MANAGEMENT

In his letter of August 13, 1969,[24] in response to my letter of August 1, 1969, inquiring about his legal aid agency's interaction with local public schools, John DeWitt Gregory, Counsel of the "Community Action for Legal Services, Inc.," of New York City, declared:

> During the (recent) school strike (in New York City), which lasted several weeks, many of our (legal aid neighborhood) offices acted as counsel to community groups which sought to re-open their schools. Several injunctive actions were brought in state court to prevent striking officials from interfering with those teachers who wanted to return to school. A similar federal action was also brought, *Rodrigues v. Skear*, 293 F. Supp. 1013 (S.D.N.Y. 1968) . . . (The strike ended before most of the cases were decided.) I should add that in several communities our offices continue to act as counsel to neighborhood parent associations.
>
> In an attempt to foster our clients' interest in community control of schools we recently cooperated in litigation challenging

> the establishment of a new centralized Board of Education for the City. *(Oliver v. Board of Education,* ——— F. Supp. ————(S.D.N.Y., 1969). . . . Finally, you may be interested in *McMillan v. Board of Education,* ————F. Supp. ———— (S.D.N.Y., 1969) a federal case in which we seek adequate schooling for brain injured children who cannot afford private schools.

In another case filed by a legal aid society which touches on a vital nerve in the management of the public schools, the "Legal Aid Society of Alamenda County" sued the Oakland, California, City Board of Education in an effort to prevent the Board from hiring a certain person as Superintendent of Schools.[25] The complaint claimed that the school board failed to comply with the procedures it had set up itself for the selection of the new Superintendent and that the school board had failed to keep the public informed of its deliberations concerning the selection of the new Superintendent. The lawsuit, however, was aborted when the new Superintendent-disignate who had been the center of this legal storm withdrew himself as a candidate for the superintendency.[26]

These cases reveal the unsettled nature of virtually every aspect of public school organization which touches upon the control of local public education. A nationwide contest for control of the public schools is underway—and the legal aid agencies have aligned themselves on the side of the poor parent of the poor child in the poor community.

VI.
SCHOOL TUITION

In a unique contact with the local public schools, Ray A. Shaffer, General Counsel of the "Indianapolis Legal Aid Society, Inc.," said in a letter dated August 25, 1969:

> Our greatest, perhaps exclusive, activities in this area is in situations where a child of school age is living with someone other than his natural parents. In such cases the school authorities require that the person with whom the child lives pay tuition for the child's attendance in school unless they have been appointed by a court the legal guardian of the child. In a proper case our office assists in this guardianship proceeding. A real hardship exists in a situation where the child's parents are living in the same city but in a different school district from the one in which the child lives. In many cases the natural parents cannot care for the child and places him with a friend or relative usually for economic reasons. In such a situation Indiana law will not permit a guardian of the child. In such cases the child must return to his natural parents or someone has to pay tuition.

This activity is in the vein of classic legal aid assistance. Effectively, it assists a poor person to become the legal guardian of a child to avoid payment of tuition for the child to attend school. It nicely illustrates the *traditional* legal aid society approach which is highly pragmatic and effective from the viewpoint of the individual client. On the other hand, the "law reform" approach would be to earnestly seek through exhaustive legal research a basis for a legal challenge to the Indiana school tuition statute and, once found, to vigorously press a test case attacking the statute's validity.

VII.

APPLICATION OF THE "ONE-MAN, ONE-VOTE" RULE TO SCHOOL BOND ELECTIONS

The Constitutions of some States require more than a simple majority "YES" vote at a school district election to approve the issuance of school bonds. In California, the state constitutional requirement is 66 2/3% "YES" vote of the voters actually voting. The "Legal Aid Society of San Diego County, Inc.," is in the process of bringing a lawsuit to force a change in the 66 2/3% requirement to a simple majority of the voters voting. This lawsuit does not represent the "breaking of new ground." In fact, it is a carbon copy of lawsuits filed elsewhere which have had the common aim of permitting school districts and other local government entities to issue bonds upon majority vote of those voting, rather than stacking the voting deck in such a way that one "NO" vote is equivalent to two "YES" votes.[27] The San Diego lawsuit will attempt to obtain legal approval of a $35,000,000 school bond issue to rehabilitate schools built before 1933 that are graded "unsafe" in their capacity to withstand earthquakes which "failed" to pass because it only received 52%, rather than the required 66 2/3%, of the popular vote at an election held November 4, 1969.

VIII.

STATE AID TO LOCAL PUBLIC SCHOOLS

In the fall of 1968, the "Western Center on Law and Poverty" operating out of the University of Southern California and funded principally by the Office of Economic Opportunity, brought suit in the Los Angeles Superior Court to force the State of California to provide for a substantially equal allocation of "resources" per student to all the public school districts of the state.[28] This lawsuit does *not* seek equal statewide apportionment of tax *money*, because it recognizes that more money must be spent in some urban areas than in suburban or rural areas. The lawsuit would not penalize rich school districts, rather its objective is to insure that the educational program offered in the poorer areas is comparable to that available to youngsters in the more affluent areas.

In St. Paul, Minnesota, the "Legal Assistant of Ramsey County, Inc., "is considering litigation which:

> . . . would test the distribution formula of educational aids under which inner-city schools do not receive benefits comparable to schools in the more affluent areas.[29]

The legal aid agencies represent only *one* of the many organizations active in the school finance position. A major difference between the legal aid agencies and the other groups, however, is that the legal aid agency, *as an organization* has no official position on school finance--but it does have clients it represents who have strong interests in quality public education for the poor.

IX.
EDUCATIONAL ACTIVITIES ABOUT THE LAW

Sargent Shriver, then Director of the Office of Economic Opportunity, said in 1965 during the embryo stages of the federally financed legal services program:

> . . . The (legal assistance) programs we wish to finance should be designed locally, by local people, to respond to local needs. This insistence has already yielded a variety of approaches: (for example) legal education by lawyers for high school teachers and guidance counsellors.[30]

The legal education programs conducted by legal aid agencies since 1964 have been recognized as an outstanding contribution by all segments of the community. These programs exist in some form or another in virtually every legal aid agency in the nation and invariably are the "pride" of every legal aid Chief Counsel. The programs range from conducting regular neighborhood seminars about such practical "gut" issues as the rights of persons whose property or wages are attached, whose automobiles are repossessed, or who are evicted from their homes to teaching children about the rule of law to develop respect for the manner in which our society governs itself.[31]

In conclusion, the whole gamut of legal aid activities in the United States indicate that the legal aid lawyer is having a profound impact upon the operation of the public schools by articulating the hopes, aspirations, and demands of the poor for what they conceive to be better educational opportunities. The effectiveness of the work of the legal aid agencies with the public schools cannot be measured only by the number of lawsuits filed. In fact, some legal aid agencies eschew filing lawsuits except as a desperate last resort. This attitude was cogently expressed by Frank B. Gorski, Chief Attorney, "Essex County Legal Aid Association," Newark, New Jersey, when he said:

> In the main . . ., the dominant reliance for law reform in education or the administrative operation, falls into the political arena where the normal give and take bargaining, mutual goodwill of parties involved, and a modicum of sanity, all play an important part.[32]

In its in-court or out-of-court representation of its clients in controversial "law reform" matters, the legal aid agency is not without its stern critics. And this is to be expected. As the Santa Clara County, California, Bar Association magazine *In Brief* remarked in an editorial commenting on the umbrage certain members of the Bar took at a cartoon jibing the local legal aid agency which had appeared in an earlier edition of *In Brief:*

> What we take exception to is the implication that, because of the lofty purpose, the awsomeness of the need or the dedication of the individuals involved, this enterprise (legal aid agency) is somehow beyond the pale of a particular brand of criticism or comment.[33]

As the legal aid agency in the United States matures as a "law reformer," it will inevitably gather storms of criticism about it in its relations with the public schools.

UPSURGE AND UPHEAVAL IN SCHOOL LAW

The public discussion evoked about the "law reform" activities of legal aid agencies will have real impact upon the future development of legal aid programs--and it seems equally clear that the operation of the public schools will continue to be influenced by the poverty clients whom the legal aid agencies represent. The extent to which financing "law reform" activities of legal aid agencies can be maintained at present or expanded levels is the key issue. Without adequate financing, "law reform" activities concerning the schools are difficult to manage by legal aid agencies.[34] Since federal funds are involved, the effect of the public discussion about the "law reform" work of legal aid agencies will be a significant factor in determining the future impact of legal aid agencies upon the operation of the local public schools in America.

FOOTNOTES

[1] 51 American Bar Association Journal 746 (August, 1965), "The Role of the Federal Government," by Theodore M. Berry, part of a report on the National Conference on Law and Poverty.

[2] Ibid, p. 748.

[3] Letter of Earl Johnson, Director, Legal Services, Office of Economic Opportunity, Executive Office of the President, dated July 3, 1968, to Donald L. Clark, President, San Diego County Legal Aid Society.

[4] Ibid.

[5] See Tinker v. Des Moines Independent Community School District, U. S. Sup. Crt., No. 21, October Term, 1968, (February 24, 1969).

[6] Knight v. Board of Education, F. Supp. (E.D., N. Y., 1969) Letter from John De Witt Gregory, Counsel, Community Action for Legal Services, Inc., New York, New York, dated August 13, 1969.

[7] Scarbrough v. Board of Education, San Francisco Unified School District, Sup. Crt. No. 586014 (Dec. 14, 1967); Petition for hearing denied by California Supreme Court, Feb. 15, 1968.

[7a] See Note 26, Infra.

[8] Letter from Roy F. Martin, Director, Legal Aid and Defender Society of Columbus, Ohio, dated August 5, 1969.

[9] Letter from Vernard C. Anderson, Jr., Staff Attorney, Yellowstone County Legal Services, Billings, Montana, dated August 4, 1969.

[10] Elementary and Secondary Education Act of 1965, 20 U. S. C. 241.

[11] Letter from John S. Hedland, Supervising Attorney, Alaska Legal Services Corporation, Anchorage, Alaska, dated October 21, 1969.

[12] Letter from Timothy J. Halloran, Executive Director, "Legal Assistance of Ramsey County, Inc.," St. Paul, Minnesota, dated August 11, 1969.

[13] Ibid.

[14] Walker v. The School Board of the Kansas City, Kansas, School District No. 500, et al., civil action filed in the U. S. District Court for the District of Kansas,(1969) and Kennedy v. The Detroit Board of Education, civil action No. 33367, U. S. District Court for the Eastern District of Michigan, Southern Division (1969). See also letter from Ronald Pollack, Staff Attorney, Center on Social Welfare Policy and Law, Columbia University, New York, New York, dated August 27, 1969.

[15] See letter from Hugh M. Boss, Attorney, Law Reform Unit, Legal Services Program, Baltimore, Maryland, dated August 28, 1969.

FOOTNOTES

[16] Letter from Michal D. Padnos, Director, "Atlanta Legal Aid Society, Inc.," Atlanta, Georgia, dated August 6, 1969.

[17] Letter from Howard W. Dixon, Executive Director, "Economic Opportunity Legal Services Program, Inc." Miami, Florida, dated August 4, 1969.

[18] *Mazzetti v. Escondido Union High School District,* San Diego County Superior Court No. 307570 filed August 1, 1968, San Diego, California.

[18a] See Note 12, *Supra.*

[19] *Johnson v. Richmond Unified School District*, Contra Costa County Superior Court No. 112094, filed October 16, 1968, Richmond, California. See letter from Ralph E. Warner, Directing, Attorney, Richmond Office, "Contra Costa Legal Services Foundation," Richmond, California, dated August 14, 1969.

[20] *Ibid.*

[21] *Olden v. Superior Court of the State of California in and for the County of Contra Cost, Respondent, and Richmond Unified School District, Real Party in Interest,* August 6, 1969.

[22] *Tijerina v. Henry,* U. S. District Court for District of New Mexico, Civil No. 7664, amended complaint filed on May 26, 1969. See letter from William G. Fitzpatrick General Counsel, "Legal Aid Society of Albuquerque," Albuquerque, New Mexico, dated August 5, 1969.

[23] *Ibid.*

[24] See Note 6, *Supra.*

[25] *Thompson v. Oakland Unified School District,* Alameda County Superior Court No. 389900 filed May 20, 1969.

[26] See Letter from Francis Kennett, Publicity Writer, "Legal Aid Society of Alameda Co.," Oakland, California, dated August 5, 1969.

[27] For a prototype of this kind of case, see *Bogert v. Kinzer,* Case No. 10446, now pending before the Supreme Court of the State of Idaho. See also, "Legal Aid Newsletter," Issue No. 5, November, 1969, published by the Legal Aid Society of San Diego County, Inc., 964 Fifth Avenue, Room 400, San Diego, California 92101.

[28] *Serrano v. Priest,* Los Angeles Superior Court No. 938254, filed August 23, 1968.

[29] See Note 12, *Supra.*

[30] 51 American Bar Association Journal 1065 (Nov., 1965), "The O.E.O. and Legal Services," R. Sargent Shriver.

[31] See letter of Daniel E. Farmer, Chief, Juvenile Law Reform Unit, "Community Legal Services, Inc.," Philadelphia, Pennsylvania, dated August 21, 1969. See also letters of: (1) Herbert C.

FOOTNOTES

Goldstein, Executive Director, "Dauphin County Legal Service Association," Harrisburg, Pa., dated August 5, 1969; Catherine Nutterville, "Neighborhood Legal Services Program," Washington, D. C., dated August 15, 1969; Phillip F. Fishman, Staff Attorney, "The Legal Aid Society of the City and County of St. Louis, Mo., dated August 19, 1969; and Hugh M. Boss, Law Reform Unit, "Legal Services Program," Baltimore, Md., dated August 28, 1969.

[32] See letter from Frank B. Gorski, Chief Attorney, "Essex County Legal Aid Association," Newark, N. J., dated August 14, 1969. See also letter from E. DeWitt Anthony, Jr., Director, "Legal Aid Society of Dallas, Inc.," Dallas, Texas.

[33] In Brief, Official Bulletin of the Santa Clara County, California, Bar Association, Vol. 5, No. 7, September, 1969.

[34] See letter from: (1) E. Bryan Henson, Jr., Director, "Tulsa County Legal Aid Society, Inc.," Tulsa, Oklahoma, dated August 19, 1969; (2) Arne T. Hendriks, General Counsel, "Legal Aid Society of Topeka, Inc.," Topeka, Kansas, dated August 20, 1969; and (3) J. MacArthur Wright, Executive Director, "Washoe County Legal Aid Society," Reno, Nevada, dated August 7, 1969.

THE LEGALITY OF SHARED TIME

by

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Shared time or as it is sometimes called dual enrollment is a procedure by which pupils regularly enrolled in a non-public school also enroll on a part-time basis in a public school. It is not in any sense to be confused with "released time" which is a procedure by which pupils are excused or dismissed from their public school classes in order to receive sectarian religious instructions on premises away from the public school. Not only are the purposes of shared time and of released time entirely different but in the case of shared time the pupil receives credit for his work at the public school which is transferred to his non-public school record or vice versa and counted toward his graduation.

Various aspects of shared time and of its many possible variations and manifestations have been discussed in two short books, in four doctoral dissertations, and in at least four masters' theses. Since this is not the proper forum for the discussions of the issues raised in these documents these writings will be listed at the end of this text and not summarized or reported on in this paper. While the topic here dealt with is not dependent on the material there contained, I will emphasize the usefulness of the items referred to for anyone wishing to become more fully informed about aspects of shared time other than its legality.

Shared time is not a new procedure nor has it ever been widely adopted although through the past decade it is likely that between 50 and 100 thousand non-public school pupils have participated to some extent in shared time programs during each

school year. Since it is not a recent development it is rather surprising that there is such a dearth of case law concerning it. Actually there are only four appellate cases concerned with the concept and of these one deals with shared time only in the form of dictum. There is also a lower court decision on this subject which is cited in the Table of Cases at the end of this paper. Unfortunately at the time of writing this paper I have been unable to obtain a copy of the opinion in that case and am therefore not able to include it in my analysis.

Aside from these four cases which I will shortly discuss, the sources from which the legality of shared time may be determined consist of 1. opinions of State attorney generals and of State Department of Education's legal counsel and 2. opinions expressed in law review articles and any other writings on the subject by persons of varying degrees of authority. This paper will deal almost entirely with the first of these sources as the second is somewhat ephemeral in any determination of the solution of the problem at hand. The excellent discussion by P. Raymond Bartholomew of the entire question of Religion and the Public Schools which appeared in the *Vanderbilt Law Review* in 1967 is however cited at the end of the Table of Cases. It is highly recommended to those wishing to pursue the subject of this paper further.

CASE LAW

Let us then first examine those court decisions which have dealt directly with the legality of shared time procedures.

The first of these cases is *Commonwealth ex rel. Wehrle v. School District of Altoona et al.* (Pa.) 88 A 481, (1913). In this case the attendance of a pupil regularly enrolled in a non-public school in manual training classes at a public school was held to be legal under the express provisions of a statute pertaining to such classes. It was unequivocally stated that this statute did not constitute the giving of public school money to private or sectarian schools.

For a long period of time this case was the only one dealing with shared time and because of its concern with a rather specialized situation it was a rather weak reed for the proponents of the legality of shared time to lean on.

Over half a century later in 1966 two cases concerned with the legality of shared time were reported. The first of these was *Morton v. Board of Education of the City of Chicago* 69 Ill. App. 2d 38, 216 NE 2nd 305, (1966). Certiorari denied by the Illinois Supreme Court in 1966.

In this case an injunction was sought against an experimental dual enrollment or shared time plan created by a Board of Education resolution and inplemented by report of the General Superintendent of Schools. The resolution provided that pupils living within the John F. Kennedy High School attendance area and otherwise eligible for full time enrollment might attend that school on a part-time basis during the experimental period from September 1965 to June 1969.

The plan was implemented in September 1965. Students took all their courses at Kennedy H.S. except English, Social Studies, Music, and Art which they took at "nearby" St. Paul High School. The public high school diploma was to be based on credits earned at both schools.

The challenge by the plaintiff was based on the claim that the procedure outlined above was 1. a violation of the Compulsory Attendance Law of the State of Illinois and 2. a violation of the Illinois and Federal Constitutional religion classes.

An appellate court affirmed the lower court's dismissal of the case. The decision turned almost entirely on the wording of the state attendance law which is carefully analyzed and thus construed to permit shared time. No mention was made of the Constitutional objections except in the last paragraph of the opinion:

> The program applies to all non-public educational institutions

> and not to any religious group or groups and offers its benefits to individual students on a purely voluntary basis upon application by the parents and legal guardians of those children. As stated in *Pierce* ' . . . the child is not the mere creature of the State . . .' the experimental dual enrollment plan adopted by the Chicago school board is merely an attempt to find a better method for the education of the Chicago public school children at the option of the parents or legal guardians of these children.

In *Special District v. Wheeler*, 408 S.W. 2d 67, (1966) the Missouri Supreme Court reached a contrary conclusion on the facts of the particular case presented.

It was held that the use of public monies to send speech teachers, hired and paid by the public school district, into parochial schools for speech therapy was not for the purpose of maintaining free public schools and that where the school district provided speech therapy for parochial school children in buildings maintained by the school district and parochial children who desired such therapy were released from school for part of their regular six-hour day, such practice violated the Compulsory Attendance Law of Missouri which requires each school child to attend school regularly for six hours during a school day.

No opinion was expressed concerning the validity of current practice when parochial school children were given speech therapy in the public school in addition to their regular school day at the parochial school.

The court cited *McVey v. Hawkins* 364 Mo. 44, 258 S.W. 2d 927 in which it was held that public school monies could not be used to transport pupils to and from parochial schools. The court stated:

> "The use of public school funds for the education of pupils in

> parochial schools is not for the purpose of maintaining public schools."

The court interpreted the compulsory attendance law requiring six hours attendance during a school day to mean attendance at one school not at several schools. The court stated that should the Legislature change these requirements the validity of such changes would be passed on after such enactment.

There was a dissenting opinion which cited the *Morton* case and which disagreed with the interpretation of the Missouri Attendance Law by the majority.

It must be noted that this decision turns largely on the judicial interpretation of a particular State statute rather than on the constitutional permissibility of the shared time program of the kind presented in the *Morton* case.

The Supreme Court of Wisconsin in *State ex rel. Reynolds v. Nusbaum* 17 Wis. 2d 148, decided in 1962, in a case about school bus transportation said in part at page 159-160:

> We have also given consideration to whether the benefits, conferred by ch. 648 upon parochial schools, differ in kind from the situation where parochial school pupils are permitted to attend certain specialized courses in the public schools. For example, it has been brought to our attention that pupils of certain parochial schools attend manual-training and domestic-science classes in the public schools. These parochial schools benefit in that they are saved the expense of providing the specialized equipment required for such courses, and of securing teachers trained to teach the same. However, let us assume but not decide that permitting children, who satisfy the age and residence requirements, to secure part of their education

> in the public schools, even though at the same time they may be in attendance at parochial schools, does not violate sec. 18, art. I, Wisconsin constitution. On this hypothesis it might be argued that permitting parochial school children to take advantage of transportation by public school bus, is a use of public school facilities equivalent to attendance at manual-training and domestic-science classes in the public schools. However, the essential difference, from a constitutional standpoint, is that riding school buses is not an educational objective of the state in itself, but merely an instrumentality to bring the pupils to the public schools where they will secure a public education. Under ch. 648, parochial school children are not to be transported to the public schools for the purpose of receiving any public instruction; rather, such transportation is merely a convenience to assist them in attending a parochial school.

Opinions of State Attorney Generals

We turn then from case law to the opinions rendered by the attorney generals of the several states. I need not caution this audience about the tenuous authority of such opinions.

Nevertheless it is obvious that school practice is very decidedly affected by such opinions.

A table at the end of this paper gives references to the opinions rendered by the attorney generals in the several states.

Twenty (20) of the state attorney generals' offices have not issued any opinion of the legality or constitutionality of shared time.

Of the remaining thirty (30) states, in only 3, Nevada, New York, and Ohio, were opinions issued officially finding the shared time concept in conflict with state constitutional provisions. In the case of New York the opinion was issued by counsel for the State Department of Education rather than by the attorney general.

In twenty-one (21) states, attorney generals' opinions were issued which unequivocally ruled that shared time was a legal and constitutional procedure. These states are: Colorado, Connecticut, Idaho, Indiana, Kansas, Kentucky, Michigan, Minnesota, Mississippi, Missouri (but see *contra* subsequent ruling by Missouri Supreme Court in *Special District v. Wheeler*), New Jersey, North Dakota, Oklahoma, Oregon, Pennsylvania, South Dakota, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

The attorney generals of six (6) states have declared that the use of shared time procedures in the special classes involved was constitutionally unobjectionable but did not generalize to all shared time procedures. These states were California, Delaware, Iowa, Nebraska, Texas, and Utah.

Three (3) states, Arizona, Kansas, and South Dakota have rulings to the effect that public school teachers may not constitutionally be permitted to go to non-public parochial schools to teach. On the other hand, the Colorado attorney general ruled that such teaching in a parochial school by a teacher on the public school payroll was unobjectionable as long as he was paid with Federal funds. The Kentucky attorney general approved this practice on the provision that the teaching be under the sole jurisdiction and supervision of the public school authorities. Vermont's attorney general found such a practice unobjectionable.

While the particular topic did not arise in most of the questions propounded to the attorney generals, it was ruled in 8 states that while shared time was constitutionally permissible its implementation in any particular situation was within the discretion of the local school authorities. The Indiana opinion stressed the fact that this discretion was not to be abused. This point was not mentioned in the opinions rendered in California, Idaho, Iowa, Kansas, Minnesota, Washington, and Wyoming.

The attorney generals of Colorado, Mississippi, and Washington ruled that public schools could not legally receive state aid *pro rata* or otherwise for shared time pupils. The contrary conclusion was reached in Delaware, Indiana, Kentucky, North Dakota, Oregon, and Vermont. The question apparently has not been raised in the remaining states.

In Delaware, Iowa, Minnesota, South Dakota, and Vermont it was ruled that shared time pupils were entitled to school transportation. The opinion of the Iowa attorney general stressed the point that such transportation did not include the trips from one school to the other.

The summary that has just been given must be read and evaluated in light of the fact that practically all the opinions rendered by the attorney generals were given in response to specific questions addressed to them which were based on specific sets of facts. It is true that some of the opinions go beyond the specific question but in general there is a quite proper tendency to stick to the issue at hand. This of course limits the degree to which it is possible to arrive at general conclusions from a reading of these opinions.

Discussion

It is true that the cases cited and many of the opinions of attorney generals hinge in large part on the interpretation of particular state statutes felt to be relevant to the issues sought to be resolved. Nevertheless the fundamental question of the legality or the constitutionality of shared time procedures rests on the resolution of the following question: Do shared time procedures contravene the provisions of the Establishment Clause of the First Amendment to the Constitution of the United States?

When this issue is squarely faced the attorney generals' opinions invariably refer to *Cochran v. Louisiana* (1930) 281 U.S. 370; *McCollum v. Board* (1948) 333 U.S. 203; *Zorach v. Clausen* (1952) 343 U.S. 306; *Everson v. Board* (1947) 330 U.S. 1; and *Board v. Allen* (1968) 392 U.S. 236. I will not presume to give any analysis of these cases to this audience but I think that you will agree that the second question that arises is: Does the concept of shared time amount to supporting or aiding a religious institution?

The familiar arguments can be made for either side. On the one hand we have the "child benefit theory" which despite some rather cavalier treatment by commentators and by some state courts has never been repudiated by the Supreme Court of the United States. Some justification might well be found for the proposition that it has indeed been strengthened by the Supreme Court decision in the *Allen* case.

On the other hand we have the view that shared time constitutes direct aid to religion in contravention of the Constitution in that it relieves the parochial school of the necessity of purchasing laboratory, gymnasium, and manual training equipment and of hiring additional teachers to teach special subjects that under shared time would be taught in the public school.

I have striven for objectivity in presenting this paper—it was not my purpose to present my personal views or my personal reasoning but rather to recount the present status of the determination of the legality of shared time. I do not think that I am departing from this objectivity when I point out that the shared time programs in those few states, for example Kentucky and Vermont, which permit public school teachers paid with tax funds to go into the parochial school to teach, sometimes in a classroom leased by the public school authorities, may ultimately find it more difficult to sustain the constitutionality of such procedures than will the participants in more conventional types of shared time procedures which involve the enrollment of parochial school students on a part-time basis in certain public school courses given at the public school.

SHARED TIME

Summary

If a nonpublic religiously sponsored school system is to survive in the United States something will have to be done and done rather soon. It is obviously a matter of deeply felt beliefs whether or not it is desirable to continue a school system other than a public one.

Assuming but expressing no opinion one way or the other that it is desirable to maintain such a system, shared time is very obviously one of the possible alternatives. Dr. Henry M. Brickell in *Nonpublic Education in Rhode Island: Alternatives for the Future* published last July has listed the possible alternatives as follows:

1. **Let the nonpublic schools continue with their current limited degree of public control and public support.**

2. **Pay a cash subsidy to nonpublic elementary and secondary schools or pupils, with the various degrees of subsidy projected.**

3. **Supply additional services to nonpublic schools at public expense, as by supplying teachers, specialists, or materials, with various degrees of subsidy projected.**

4. **Make it convenient for nonpublic school pupils to enroll part-time in public schools to study selected subjects, with various proportions of time and choices of subjects projected.**

5. **Modify public schools so that religious instruction can be given regularly and conveniently by religious institutions, possibly in or adjacent to the public schools.**

6. **Launch an elaborate publicly-supported program of research,**

> development, and experimentation in a search for new forms of religious education which use modern communications media and new patterns of personnel deployment. Search for inventions which are powerful enough to replace current forms and economical enough to survive with private support.

I do not think that it detracts from the objective nature of this paper to say that of these alternatives the most likely to escape condemnation of the courts as a violation of the Establishment Clause of the First Amendment is the fourth alternative which I will repeat:

> 4. Make it convenient for nonpublic school pupils to enroll part-time in public schools to study selected subjects, with various proportions of time and choices of subjects projected.

Dr. Brickell makes the following comment about this alternative:

> As Erickson (Professor Donald A. Erickson of the University of Chicago) points out, this plan is a variant of the preceding plan, inasmuch as it is simply a special method of extending services to nonpublic schools at public expense. Rhode Island Catholics disagree on the merits of this plan. A majority of the laymen are opposed while a majority of those in the religious vocations are in favor. The acceptability of this plan probably turns upon whether students enrolled in two schools will develop a "home base" in either school. This is particularly important for very young children. High school students may lose their allegiance to their nonpublic school if the subjects and activities they take in public school happen to be more attractive than the ones they take in their nonpublic school. Acceptance of the plan also turns upon scheduling and how

far students have to travel.

This plan offers pupils the best of two worlds and makes it easy for the nonpublic school to limit its responsibility to those subjects where there is a good reason to offer instruction different from that in public schools. It can make the most efficient use of nonpublic funds by allowing them to be spent directly on the subjects important to the sponsors of the nonpublic school rather than causing them to operate a full-fledged program simply in order to get access to pupils for two or three high-priority subjects.

If I am correct in my assumption that shared time is one of the most likely solutions to the present crisis in nonpublic schools sponsored by religious organizations, then the foregoing material on its constitutionality should prove to be important and hopefully of value to those charged with the responsibility of making decisions in this area.

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2. Morton v. Board of Education of the City of Chicago 69, Ill. App. 2d 38, 216 N.E. 2nd 305, 1966.

3. Special District for the Education and Training of Handicapped Children of St. Louis City, Missouri v. Hubert Wheeler, Commissioner of Education, State of Missouri et al., (Mo.) 408 S.W. 2d 67, 1966.

4. State ex rel. Reynolds v. Nusbaum, 17 Wisc. 2d 148 at 159 – 60, 1962.

5. Smith v. Fitzgerald School District, Macomb County, Mich. Circuit Court Case No. X692848, 1969.

6. 20 Vanderbilt Law Review, 1078.

Opinions of State Attorney Generals

Alabama	**X[1] 9/16/69**
Alaska	**X 8/31/66**
Arizona	**OAG 10/4/65**
Arkansas	**X 9/23/69**
California	**OAG 61/237 3/9/62**
Colorado	**OAG 65-3883 8/9/65**
Connecticut	**OAG 9/3/65; OAG 9/24/65**
Delaware	**OAG 9/3/65; OAG 9/24/65**
Florida	**X 11/20/64**
Georgia	**X 9/23/69**
Hawaii	**X 9/17/69**
Idaho	**OAG 12/7/65**
Illinois	**X 9/12/66 (but see OAG 11/6/52 and OAG 3/12/55)**
Indiana	**OAG (Unofficial) 4/28/64**
Iowa	**OAG 11/4/65; OAG 4/14/66; OAG 4/27/67**
Kansas	**OAG 6/24/65; OAG 1/6/69; OAG 8/11/69**
Kentucky	**OAG 68-150 4/3/68; OAG 68-423 8/12/68; OAG 68-585 11/13/68.**
Louisiana	**X 9/16/69**
Maine	**OAG 10/22/64[2]**
Maryland	**X 9/17/69 (but see OAG 3/23/64)**
Massachusetts	**X 9/30/69**
Michigan	**OAG 9/3/69**
Minnesota	**OAG 3727 12/5/44 (see also OAG's 12/8/47, 4/26/51 and 8/7/59.**
Mississippi	**OAG 1/6/69**
Missouri	**OAG 104 2/15/63 (but see contra: Special District v. Wheeler.)**
Montana	**X 9/22/69**
Nebraska	**2/25/65**
Nevada	**OAG 278 11/15/65 (see also OAG 11/5/65 and OAG 291 12/22/65).**
New Hampshire	**X 9/19/69 (The Supreme Court of New Hamsphire has said that it will issue an advisory opinion to the state legislature on the legality of shared time prior to January 1970.)**

Opinions of State Attorney Generals

New Jersey	OAG 1965 – No. 11/29/65
New Mexico	X 11/23/64
New York	Opinion 7/15/65 (State Education Department Counsel 7/22/65: 9/24/69.)
North Carolina	X 9/30/69
North Dakota	OAG 3/11/66
Ohio	OAG 65-10 1/25/65
Oklahoma	OAG 5/14/62; OAG 65-163 3/24/65
Oregon	OAG 4411, 4/1/59; OAG 5702, 9/16/63; OAG 6162, 7/29/66.
Pennsylvania	–
Rhode Island	X 10/2/69
South Carolina	X 9/23/69
South Dakota	OAT 7/23/64
Tennessee	X 9/29/69
Texas	X 8/30/66 (but see OAG C-719, 7/8/66.)
Utah	OAG 63-066, 10/30/63 (see also OAG 69-001, 1/5/69.)
Vermont	OAG No. 102, 6/10/66; OAG no. 104, 8/28/66; OAG No. 80, 3/3/69; OAG No. 95, 3/3/69; OAG No. 198F, 6/12/69; OAG No. 289, 9/18/69.
Virginia	X 9/18/69
Washington	OAG 63-64, No. 130. 12/12/64
West Virginia	OAG 9/8/68
Wisconsin	OAG 550-124, 7/19/66 (see also OAG 530-187, 1953.
Wyoming	OAG 12/2/65

[1] All States marked "X" are states in which the attorney general has not rendered any opinion on the subject of shared time. The date following the "X" indicates the lastest date on which this information was verified.

THE LEGAL RIGHTS OF UNTENURED TEACHERS

By

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About three quarters of the states have tenure laws applicable to teachers.[1] The remaining one quarter of the states have no tenure laws.

My remarks today will relate to all teachers not serving on tenure.

In discussing these rights I am not going to review the laws of the fifty states. I suggest that these state laws relating to tenure and untenured teachers do vary. Some states do grant non-tenure teachers some rights in connection with proposed suspension and dismissal, or both. For example, the laws of California, Connecticut and Rhode Island do provide varying degrees of procedural due process to non-tenure teachers subject to suspension and dismissal proceedings.

Other states, such as Massachusetts, practice no procedural due process at all to non-tenure teachers.[2]

The spirit of the Massachusetts laws relating to the right of non-tenure teachers and of many other states is best exemplified in the following quotation from *People v. City of Chicago*, 278 Ill. 318, 116 N.E. 158 (1917) where at page 325 the court stated:

> "It is no infringement on the constitutional rights of

> anyone for the board to decline to employ him as a teacher in the schools, and it is immaterial whether the reason for the refusal to employ him is because the applicant is married or unmarried, is of fair complexion or dark, is or is not a member of a trades union, or whether no reason is given for such refusal. The board is not bound to give any reason for its action."

So, why this presentation?

Well, Justice Fortas in the Gault[3] Case involving the rights of a juvenile charged with criminal offenses said:

> ". . . neither the Fourteenth Amendment nor the Bill of Rights is for adults alone" p. 10

And in the Pred[4] case, decided by the 5th Circuit Court of Appeals in 1969, which I will refer to later the Court said:

> "Simply because teachers are on the public payroll does not make them second class citizens in regard to their constitutional rights." p. 855

We know that the validity and application of a state law is subject to a basic requirement in that it must not violate the provisions of the Federal Constitution, as amended, including the Bill of Rights.

In all cases it is the Federal Constitution and its interpretation by the Federal judiciary which controls state action.

Accordingly I am going to discuss a few cases involving the application of the

Federal Constitution–in particular–the Bill of Rights–the State laws relating to the non-tenure teacher.

Many of you may be curious as to how the Constitution and the Bill of Rights are brought into cases involving the rights of teacher–be it in the non-tenure area, academic freedom or otherwise.

Well, they are usually brought pursuant to the provisions of a federal law that was passed by Congress in 1871.

And that is Title 42 United States Code Section 1983–known as the Civil Rights Act of 1871. That law reads as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subject, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

One of the early cases wherein a non-tenure teacher sought the protection of the 1871 Civil Rights law against an unilateral discharge is *Bomar v. Keyes*, 162 F 2d 136 (1947).

In the Bomar case the non-tenure teacher was discharged because she exercised her option to serve on a federal grand jury and did so for about four weeks.

She was discharged. She appealed to the Commissioner of Education in New York and applied for reinstatement alleging that she had been discharged because of "displeasure with (her) assumption of jury duty."

The commissioner dismissed her appeal upon the ground that she "had not secured permanent tenure. Having been dismissed by the Board of Education during her probationary period, such dismissal is not subject to review."

She then brought an action in the Supreme Court of the State of New York against the commissioner and the board of education seeking reinstatement.

She alleged that she had been "penalized for her proper and legal performance of her duties and obligations of citizenship, including the assumption of jury duty."

This petition was also dismissed on the same ground that the commissioner had dismissed her appeal.

She then filed a complaint in the United States District Court, alleging a violation of the Civil Rights Act of 1871.

The U. S. District Court ruled against her and sustained the board of education's motion for a summary judgment.

She then appealed to the U. S. Circuit Court of Appeals.

Judge Learned Hand wrote the decision reversing the decision of the District Court and remanded the case for trial.

Judge Hand ruled that the Civil Rights Act of 1871 applied to her case.

He found that if she was solely discharged for the ground that she alleged was the cause–that that decision could not stand–and she was entitled to a trial on the questions raised by her.

She had "an expectancy of continued employment" and could not be discharged in violation of her constitutional rights–and accordingly a trial was necessary to determine the cause for her discharge.

In the Pred[5] case decided in 1969, the facts were as follows: A math teacher and an English teacher in the Miami Dade County Junior College were each in the third year of service and if reappointed would thereby have acquired tenure.

The Board of Public Instruction of Dade County, the governing board, denied tenure to these teachers.

The teachers then filed a complaint in the United States District Court claiming that they were denied tenure because of the activity of one teacher in the affairs of the local teachers association and in the case of the other teacher by her advancement in her classes of new demands for campus freedom.

The teachers claimed that their denial of tenure for those reasons constituted a denial of their constitutional rights under the First Amendment (rights of free speech and association).

The United States District Court in the Southern District of Florida dismissed the complaint without a trial and the teachers appealed to the Fifth Circuit Court of Appeals.

The governing board argued before the Circuit Court that no one had a right to public employment and hence relief should be denied and the District Court decision be sustained.

The Circuit Court stated its opinion by saying:

> "This is another monument to needless waste of lawyer

> and Judge time and perhaps more important, client money. For now, 14 months later, the case must go back to start the normal process of discovery leading to the production of facts or the demonstrated lack of them on which, either before, or after the conventional trial, the real merits of the case will be determined." p. 852

The Circuit Court justified its decision of reversal by quoting extensively from decisions of the Supreme Court of the United States.

In response to the argument of the governing board that no one had a right to public employment the court quoted:

> "To state that a person does not have a constitutional right to government employment is only to say that he must comply with reasonable lawful and non-discriminatory terms laid down by the proper authorities . . ."

Slochhower v. Board of Higher Education, 350 G.S. 551, 555 (1956).

> ". . . Constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory."

Wiemann v. Updegraft, 344 U.S. 183, 191, (1956).

> "The theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected."

Keyishian v. Board of Regents, 385 U.S. 589, 605-609 (1967).

"The protections of the First Amendment have been given special meaning when teachers have been involved. Simply because teachers are on the public payroll does not make them second class citizens in regard to their constitutional rights." p. 855.

Keyishian v. Board of Regents, 385 U.S.D. 589, 603.

"Our nation is deeply committed to safeguarding academic freedom."

Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).

"To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our nation."

Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).

"The vigilant protection of constitutional freedom is no where more vital than in the community of American Schools."

Shelton v. Tucker, 364 U.S. 479, 487.

The court then went on to say:

"Equally unpersuasive is the argument that since there is no constitutional right to public employment, school officials only allowed these teacher contracts to expire—and thus they cannot be liable for a violation of any rights protected by

Sec. 1983." p. 856.

> "... The right sought to be vindicated is ***not*** a contractual one nor could it be since no right to reemployment existed. What is at stake is the vindication of constitutional rights—*the right not to be punished by the state or to suffer retaliation at its hand because a public employee persists in the exercise of first amendment rights.* 856. (Emphasis supplied)

The court then considered the basic question involved in this case. That is, may the state constitutionally deny a state created status because of First Amendment activities of the teacher?

The court suggested that the answer was not clearly yes or no but rather involved the balancing of interests.

The decision stated that in the Pickering[6] and Tinker[7] the Supreme Court did state that there are limitations on speech both for teachers and students.

"The problem," the court stated in quoting from Pickering "in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees". p. 857.

Again quoting from the Pickering decision the Court said:

> "In order for the state in the person of school officials to justify prohibition of a particular expression of opinion must be able to show that its action was caused by something

> more than a mere desire to avoid discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that the expression of the forbidden right would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school' the prohibition cannot be sustained." p. 859.

Accordingly the decision of the District Court was reversed and the case was remanded to the District Court for a trial to determine if the facts alleged by the teachers were true.

> "For on the facts must rest the determination of whether the denial of a continuing contract was (1) a refusal for these actions in expression of ideas, thoughts or association rather than permissible non-discriminatory professional evaluation and, if so, (2) whether under the circumstances in relation to the reasonable demands of a system of organized responsible learning these actions were protected. On a finding of (1) and (2) the remedy (3) might well also depend on all of the facts." p. 859

Because many Massachusetts superintendents are here today—and because I personally participated in this case—I will discuss the case of *Lucia W. Dugan*, 303 F. Supp. 112 (1969).

David Lucia started the school year 1968-1969 as his third year of service in the small town of Monson, in the western part of Massachusetts.

In the ordinary course of events if the school committee failed to notify him on/or before April 15 of 1969 that he was not to be reemployed for the following year

he would thereby have acquired tenure.

Further it was then commonly understood, by those familiar with the Massachusetts laws, that a non-tenure teacher such as Mr. Lucia had no rights or hardly any rights.

It was then commonly thought—and I frequently had advised school boards when I had represented them in my earlier career—and later teaching—that a non-tenure teacher was subject to unilateral, arbitrary suspension and dismissal, under Massachusetts law.

Well, David Lucia raised a beard during the Christmas vacation. He appeared in school when classes resumed on January 2 wearing his new facial adornment which was neat in appearance.

He taught wearing his beard from January 2 to January 17—and during that time there *was no disruption of his classroom or the learning situation caused by his wearing a beard.*

Early in January the Superintendent told Lucia that it was the unwritten policy of the school committee that teachers should be clean shaven on the job.

On January 15 the superintendent handed Mr. Lucia the following letter:

> **"Dear Mr. Lucia,**
>
> **On Wednesday, January 8, 1969, the Monson school committee discussed the wearing of beards and moustaches by male members of the Staff. It is our wish that our teachers not have a beard or moustache while in the performance of their professional duties.**

UPSURGE AND UPHEAVAL IN SCHOOL LAW

> **"It is requested that you not wear a moustache or beard while teaching."**

Mr. Lucia continued to wear his beard.

On January 16 the school committee voted to suspend Lucia for 7 days beginning Monday January 20 through January 28, in accordance with Massachusetts law. (General Laws. C.71, S.42A)

Mr. Lucia was given no notice of the possible suspension action *nor* any notice of the January 16th meeting.

On January 28, the school committee met again and voted that if Mr. Lucia appeared in school with his beard on January 29th he was to be suspended for an additional two days. The School Committee also voted to meet January 30th for the purpose of voting on his dismissal. Mr. Lucia was not notified of the January 30th meeting or its purpose. On January 30th the school committee voted to dismiss Mr. Lucia.

About fifty citizens were present at this meeting and supported Mr. Lucia. They requested the school committee to state reasons for its contemplated dismissal of Mr. Lucia. The school committee refused to offer any reasons.

Thereafter the school committee voted to dismiss. The school committee individually resigned from office!

Mr. Lucia then sought the assistance of the Massachusetts Teachers Association and the DuShane Emergency Fund of the National Education Association and my firm was retained as counsel—Philip A. Mason, Esquire and myself represented Mr. Lucia.

RIGHTS OF UNTENURED

We filed a complaint in the United States District Court in Boston against the individual members of the school committee and the superintendent. We joined the superintendent as a party defendant, as under Massachusetts law the superintendent's recommendation for dismissal was a prerequisite and it had been made in this case.

Our case was predicated on Title 42 United States Code, Section 1983, and we also sought financial damages.

We argued four points:

1. That Mr. Lucia had a constitutional right under the Fourteenth Amendment to wear his beard.

2. That his wearing of a beard was protected under the First Amendment (symbolical expression).

3. That the Massachusetts laws providing different protection for teachers on tenure vis-a-vis teachers not on tenure constituted unequal protection of the laws under the Fourteenth Amendment.

4. That Mr. Lucia hadbeen denied the procedural due process he was entitled to under the Fourteenth Amendment.

Judge Garritz ruled for Mr. Lucia on the basis of our fourth Argument, denial of procedural due process and said:

> "Plantiff's interest in wearing a beard and his career as a teacher is not nullified by his having been employed less than the three years required to achieve tenure status" p. 118.

The court went on to say:

> "The particular circumstances of a dismissal of a public school teacher provide compelling reasons for application of a doctrine of procedural due process" p. 118.

The court quoted approval from the Shelton[8] case:

> "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."

Accordingly the court held that Mr. Lucia's suspension and dismissal violated the due process clause of the Fourteenth Amendment and was unlawful and null and void. He further order the respondent to pay to Mr. Lucia $2575, or ($1000 for pain and suffering and $1575 for loss of wages) plus the costs.

Another interesting case involving the alleged refusal of a school board to reappoint a teacher in violation of his constitutional rights is the Albaum[9] case.

In this case a high school teacher sued the superintendent and individual members of the school board to compel the superintendent to recommend him and for the board to consider him for tenure. He contended that the superintendent's failure to recommend him deprived him of his rights of free speech and assembly under the First Amendment. He, likewise, sought relief under the Civil Rights Act of 1871, Title 42 United States Code, Section 1983.

In brief, Mr. Albaum claimed that from the time of his employment in 1964 to December, 1966 all of his evaluation reports were superior.

He went on to say that this praise stopped in December 1966 after the superintendent became aware that he had become contract negotiator for the teacher's association and then did not recommend him for tenure.

The school board filed a motion to dismiss the case on the ground that the New York statutes controlled and that no Federal questions were involved.

Judge Weinstein, of the U. S. District Court, said:

> "Plaintiff states a claim upon which relief can be granted. The complaint can be fairly read to allege that plaintiff–a model teacher–was not granted tenure solely because he participated in a teacher's union in a high level capacity. Within the confines of his complaint, plaintiff would be able to offer proof that he was punished by an agency of the state for merely inviting fellow teachers to his home to extol the virtues of unionization and to urge them to organize.

"Since the federal constitution protects such expression and association from intrusion by the states, plaintiff's allegation that he was denied tenure in a state school because he exercised his rights of free speech states a cause of action over which this court has jurisdiction under the Civil Rights Act, 42 U.S.C.S. 1983" p. 5

Accordingly the court granted the plaintiff's motion for a three judge court to determine the validity of the constitutional issues he raised.

The case of *McLaughlin v. Tilendis* 398 F. 2d 287, (1968) (2CCA) raised questions similar to the ones in the Albaum case. In the Tilendis case one teacher was not offered a contract for his second year and another was dismissed at the end of his second year.

Both teachers alleged that these negative actions were taken by the school board because of their association with the teachers union.

The district court granted the school board's motion for summary judgment holding that the teachers had no right under the First Amendment to form or join a labor union and hence the court lacked jurisdiction under the Civil Rights Act of 1871.

The Circuit Court reversed on the ground that the First Amendment does confer the right to form and join a labor union.

The court held:

> "It is settled that teachers have the right of free association and unjustified interference with teacher's associational freedom violates the due process clause of the Fourteenth Amendment".
>
> "Public employment may not be subjected to unreasonable conditions, and the assertion of First Amendments rights by teachers will usually not warrant their dismissal" p.288,289.
>
> "Even though the individual plaintiffs did not have tenure, the civil rights act of 1871 gives them a remedy if their contracts were not renewed because of their exercise of constitutional rights". p. 289.

The case was then remanded to the district court for a trial on the merits.

There is a federal case holding somewhat contra to the cases discussed above. In *Parker v. Board of Education*, 348 F.2d.464 (4CCA) (1965), a probationary teacher was dismissed without notice and a hearing and this dismissal was upheld by the courts. This decision rested entirely on the written contract and the court did not go into the constitutional questions.

The question arises as to whether the rule of law stated in the Lucia case involving the discharge of a non-tenure teacher is applicable to the situation where the school board fails to reappoint a teacher for the succeeding year.

In my opinion the situations are essentially the same and in neither case can the teacher's employment be terminated in violation of his constitutional rights unless the balancing of interests favor the school board.

The Pred and Albaum cases both relate to failure to reappoint as distinguished from discharge.

Now what does all this mean? It is dangerous to reduce complex legal principles to simple terms—but I think in this situation it can be done—in any event I will try.

1. All state laws relating to tenure or the non-tenure of teachers are subject to the Constitution of the United States of America as amended.

2. None of the state laws can serve to deny a person his constitutional rights.

3. Teachers are no different than any other persons with respect to the protection afforded by the constitution.

4. Whether a teacher is on tenure or not—he is entitled to constitutional protection.

5. The Civil Rights Act of 1871 prohibits school boards from action to deprive a person—teacher—of his constitutional rights.

6. The state has a constitutional right to operate the schools.

7. Therefore situations present a balance of interests.

8. Teacher's constitutional rights versus the state's interest to operate the schools.

Unless the exercise of the teacher's constitutional rights in some degree interferes with the proper operation of the schools, the teacher will prevail—even if he is not on tenure."

FOOTNOTES

[1] "School Law For Teachers," Nolte and Linn, 1964, p. 275.

[2] Massachusetts General Laws, Chapter 71, Section 42, 42D.

[3] In re Gault, 387 U. S. 1 (1967).

[4] Pred v. Board of Public Instruction, 415 F.2d, 851 C1969 (5th CCA).

[5] Id.

[6] Pickering v. Board of Education, 391 U. S. 563 (1968).

[7] Tinker v. Des Moines Community School District, 393 U. S. 503 (1969).

[8] Shelton v. Tucker, 364 U. S. 479, 487 (1960).

[9] Albaum v. Carey, 283 F. Supp. 3 (1968).

THE WARREN COURT AND THE PUBLIC SCHOOLS

by

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Fifty years from now history will be a better judge of the Warren Court than contemporary critics. Better remembered and more enduring will be the decisions themselves rather than personal attacks on the justices, often for the sake of personal advantage or political expediency. Nonetheless, it is popular to make immediate assessments of given periods of history and, more particularly, of individuals credited with having major impact on that period of time.

The Warren Court Era is being subjected to such scrutiny. Indeed a number of critics made their judgments early, some as early as the Court's first major decision, *Brown I*,[1] and have not changed their views since. With the retirement of Chief Justice Earl Warren, there has been greater cause to consider the impact of the Court's decisions during his time on the high bench.

The Warren Court—so called—may well be a misnomer. If it implies that there has been a stable body of nine justices sitting from 1953-1969, then it surely is misnamed. Of the ninety-seven justices throughout the life of the Court, sixteen, excluding the Chief Justice, served during this time. In effect, the number actually constituted a sufficient force for two separate courts. Collectively, the justices of the Warren Court served over 220 years—ranging from Thurgood Marshall's three terms to Hugo Black's thirty-two years. Only three justices sat during the entire sixteen years—

Black, William O. Douglas, and the Chief Justice.

As fourteenth Chief Justice, Earl Warren presided over a Court which, by anyone's standards, would be labeled active. In decisions affecting public education alone, it handed down more opinions than all the previous Supreme Courts.

Because Warren was the Chief Justice, he has been singled out for both commendation and abuse, depending on one's point of view. He has been praised and excoriated for initiating a revolution in the field of human rights; restructuring the legal, political, and social system; and allowing subversives to undermine the integrity of the state. Those persons who give major credit or blame to Warren reveal a lack of understanding of the basic role of the Chief Justice. Actually, the Chief Justice is one among nine equals in that he possesses no real authority over the associate justices. His influence is more imaginary or discrete, for he can only persuade, not dictate. One need only to be reminded of the large number of concurring and dissenting opinions in recent years to discern the independent thinking of the justices.

The influence of the Chief Justice may be revealed in the Court's *modus operandi:* (1) He presides at the closed conferences and leads off the arguments. By focusing on what he deems to be the real issues in the case, the Chief Justice may guide the associate justices, although they do not have to agree with him and may pursue an entirely different line of reasoning. (2) He votes last. His strength here is in his ability to break a deadlocked Court. (3) He assigns the writing of the opinion, if he votes with the majority, to one of the justices. Justices do have, however, editorial privileges and have been known to change their votes during the writing of an opinion.

Rather, then, than view the Court's previous sixteen years as being Warren-dominated, it is more appropriate to assess the Supreme Court in general. In its decisions affecting public education, what did the Warren Court actually decide? Placed in their proper perspective, what is the significance of these decisions?

UPSURGE AND UPHEAVAL IN SCHOOL LAW

The Supreme Court of the Warren Era handed down decisions in three major areas of education: segregation, religion, and academic freedom. Most vividly remembered will be the decision outlawing racial segregation in the public schools. *Brown v. Board*,[2] was, in fact, the first important decision of the Warren Court. Subsequent decisions were to define and help clarify standards of desegregation. The two *Brown* decisions[3] continued a pattern of judicial reasoning of the Court first made clear in 1938 in *Gaines*.[4] The effect of *Brown* was far different, however, in that it dealt, not with an individual, but with tens of thousands of persons residing in seventeen states and the District of Columbia.

Many people have misinterpreted the segregation decisions as being an order to integrate all schools. Actually, the Warren Court has never outrightly ordered integration as such; it has ordered desegregation. But the Court has not ruled that there is no place for an all-black or an all-white school. In a number of attendance units and school districts in this country there is only one race. What the Court has held is that, for purposes of assigning children to school, there cannot be racial discrimination.

Within the framework of the two *Brown* decisions, the Court has been highly consistent and predictable in its subsequent holdings. In the thirteen segregation decisions, there has been unanimity in all but one opinion, that being a dissent by Justice Harland on a procedural question in *McNeese*.[5]

Fifteen years after *Brown I* the Warren Court had had limited success in seeing its decision implemented. Many school systems disregarded the Court's holding, attempted evasion tactics, or sought delays when pressed by the Justice Department or the courts. Many citizens had not caught up with the Court's decision nor accepted it as the law of the land. For example, at the opening of school in September, 1969 fewer than 10 percent of Negro children in Alabama and Mississippi were in a desegregated school.[6]

The Warren Court would have preferred to have handed down no more education segregation decisions after Brown II. It had placed the responsibility for desegregation plans with local school officials and allowed flexibility in compliance. There might well have been more immediate compliance had the justices avoided the euphemistic standard, "with all deliberate speed." In the meantime, there had been covert and invidious circumvention of the Court's edict.

The Court has followed three general patterns in seeing its segregation decision implemented. During the eight years following *Brown* the justices acted with restrained patience in giving local officials time to merge dual school systems. The Court demonstrated its understanding of the gravity of the problem facing local school personnel in *Cooper*[7] where it held that one's constitutional rights cannot be suspended during violence or the threat of violence–here at Little Rock, Arkansas High School. The charge was made to state officials to comply in law and spirit to the same degree that local officials had. *Girard*[8] extended *Brown* in holding that an essentially private school is subject to desegregation if its board is selected by a state agency.

Beginning in 1963 the mood of the Court shifted to that of immediate compliance. It saw in *Goss*[9] that a pupil transfer plan operated on racial factors; it held in *McNeese*[10] that one does not have to exhaust state remedies before seeking relief in the federal court. It disallowed the state of Virginia to permit a county to close its schools.[11] In 1965 it held in *Rogers*[12] that desegregation on the basis of a-grade-a-year is too slow.

Three years after *Rogers*, in three separate opinions,[13] each treating freedom-of-choice plans, the Court's new standard was made clear: a placement plan would be upheld only if it works, that is, if it desegregates a school district. Its last decision in 1969 ordered faculty desegregation in Alabama.[14]

It has remained for Warren's successor, the Burger Court, to hold in its first decision that the "all deliberate speed" standard is no longer constitutionally acceptable.[15] This decision announced yet another standard, that school districts should desegregate immediately and then seek court action.

One cannot expect the segregation decisions of the Warren Court to be overturned. It is better for one to ask what might be expected from the Burger Court. Many school districts in the South remain segregated; equally or far more wide-spread is *de facto* segregation in many parts of the North. The Court has not ruled on the constitutionality of the latter.

There are currently two cases before the Court involving education and race. One is an appeal from a Georgia citizen who alleges discrimination in the selection of county boards of education. The other case involves teacher dismissal in Arkansas. Negro teachers, dismissed by their principal, were given a hearing but no opportunity to confront their Negro principal who had recommended their discharge. One can expect other areas of litigation, too.

The second major area of education in which the Warren Court rulings have affected large numbers of people is religion. Although deciding a relatively small number of cases, the Court precipitated what has probably been the greatest disobedience to any of its decisions.

In holding that prayer and Bible reading as devotional exercises are in violation of the establishment clause of the First Amendment, the Court was immediately called "godless."[16] Following the *Engle v. Vitale* decision[17] of 1962 which overruled the Regent's Prayer, a municipal judge opened Court in Los Angeles with this plea, "God bless the Supreme Court, and in Your wisdom let it be shown the error of its ways."

Many of the Court's most vocal critics did interpret and have since interpreted that any exercise connected with religion was to be completely divorced from education. Actually, the justices did not take religion out of the schools. Moreover, it did not remove all Bible reading and prayer from the schools. It did hold that state mandated, endorsed, or supported prayer and Bible reading as religious exercises is impermissible. This leaves open the way for any student to pray on his own whenever he wishes; it allows students to study about religion. An objective study of religion, as literature or history, would meet the Court's test, "What are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion, then the enactment exceeds the scope of legislative power."[18]

What the Court has really said is that, if a state has as one of its objectives, making persons religious or more religious, then that purpose transcends the neutrality principle of the First Amendment's establishment clause. This clause prohibits a state from setting up a church, favoring one religion over another, some religions over others, or all religions over none. The state as a state must remain neutral.

Yet, the problem is not so simple as the Court's test suggests, and the justices recognize this. There are religious practices involving the state (even the Supreme Court opens with a plea to the Almighty) and it is not clear where accommodation ends and state support begins. Within the school program itself, there are a number of ancillary practices touching on or directly involving religion: (1) assembly programs with ministers as guest speakers, (2) baccalaureate services, (3) patriotic exercises incorporating religious themes, (4) performances treating religious events, (5) religious holidays, and (6) religious displays. The Court has not ruled on the legality of these. Justice Brennan offers one solution: "To what extent, and at what points in the curriculum, religious materials should be cited are matters which the courts ought to entrust very largely to the experienced officials who superintend our Nation's public schools. They are experienced in such matters, and we are not."[19]

The Warren Court handed down three other cases involving religion and the public schools. In *Flast v. Cohen*[20] the Court modified a long-standing precedent by holding that an individual may challenge federal appropriations on the grounds that such expenditures violate the establishment clause. While the real impact and significance of this case is yet to be felt, it is recognized that action was initiated originally to allow a challenge to Title III of the Elementary and Secondary Education Act providing for shared services of public and parochial schools. Whereas a follow-up case may clarify questions about the legality of non-public schools sharing welfare benefits derived from public tax funds, the *Flast* decision could also give cause to a rash of litigation.

The *Allen* case[21] created hardly a ripple of protest as compared with *Everson*[22] decided twenty-one years earlier. By allowing the state of New York to distribute textbooks, at taxpayer's expense, to children in parochial schools, the Court reaffirmed its belief in the vital role that private education plays in this country. It recognized that these non-public schools have a dual purpose: secular and sectarian education. *Allen* holds that the secular function may be assisted by government without abridging the establishment clause.

In *Epperson*[23] the Court treated a tangenital religious question. By striking down an Arkansas statute forbidding the teaching of evolution, the justices defended a teacher's academic freedom and held that "The First Amendment does not permit the state to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma."[24] Since only two states had anti-evolution laws, neither of which was enforced, the decision evoked minimal reaction.

One might expect more litigation in the years ahead over the church-state controversy than in the area of segregation. No crystal clear standard of state accommodation and cooperation has been devised which would answer a number of questions. This problem is particularly acute as more agencies vie for the tax dollar, as parochial schools need financial assistance more than ever, and as religious heterogeneity creates new situations and prompts suitable answers.

Two church-state cases are now before the Court. The major one involves the long-standing practice of allowing churches to maintain tax exempt property, a case the Warren Court passed to the Burger Court. The other challenges a state grant of financial assistance to church-related but not church-dominated colleges. In this case

Vermont statutes allow such aid to colleges and public schools for construction purposes.

The third major area in which the Warren Court handed down public school decisions was academic freedom. Twelve decisions were rendered, and they concerned a variety of issues. They are conveniently grouped under three headings: challenges to loyalty oath laws, resistance to investigations of teachers, and freedom of speech for both teachers and pupils.

Five of the twelve cases attacked the legality of loyalty oath laws.[25] The Supreme Court overturned each of them for failure to describe with specificity the kinds of behavior that are proscribed. In these decisions the Court revealed deep division in attempting to ascertain if contemporary society needed statutes restricting teacher's conduct. The majority consistently held that there is no real threat to the state's security sufficient to justify the oath laws in question. Each of these laws was negatively structured, that is, provided for a teacher to swear generally that he would not engage in any activity or belong to any organization committed to overthrow the national or state government by force or violence. More likely to receive judicial sanction are the positively stated oath laws; the legality of these was not a question before the Warren Court.

Other academic freedom decisions involved also freedom of association of teachers. Earlier cases heard by the Warren Court grew out of state restrictions on individual freedoms in post-World War II and the hysteria during the McCarthy Era. In refusing to allow sweeping investigations to infringe on one's personal liberties, the Court acted as a leavening influence in holding that *carte blanche* inquiries may be unconstitutional. Its first such decision, Slochower[26], held that a person could refuse to testify about activities unrelated to the investigation. It did hold, however, that the state may properly investigate a person's fitness for teaching.

Similarly, the Court ruled that an attorney general could not be given such broad investigative powers as to amount to a denial of due process; further, a teacher's freedom to pursue his profession is protected to the extent that he does not have to reveal the contents of his lecture.[27]

The right of Congress to investigate generally in the field of education was upheld in *Barenblatt.*[28] A teacher's knowledge about alleged Communist infiltration was held to be within the realm of pertinent inquiry when used as a basis for lawmaking.

A different kind of investigation was treated in *Beilan*[29] where the Court upheld a teacher's dismissal for failure to respond to his superintendent's questions. Here, incompetency was the basis for terminating the teacher's contract.

The final association case, *Shelton,*[30] overturned a state statute requiring full disclosure of membership in all organizations. It was held that such sweeping associations do not, in themselves, have any relevancy to one's fitness to teach.

The two most recent academic freedom cases treated the question of freedom of speech of both teachers and pupils. In *Pickering*[31] the Court upheld the right of a teacher to criticize publicly his employer without threat of dismissal. This right is so broad that it may injure the school system, or the statements may be false, although made innocently.

In *Tinker v. Des Moines*[32] the Court extended freedom of speech to include pupils in the public schools. The Court upheld the right of students to protest the Vietnam War by engaging in symbolic speech. Free speech guaranteed here was conditioned to the extent that it did not disrupt the school program.

Through these decisions, treated very briefly here, one may discern that the Supreme Court has reaffirmed the authority of the states to deal with the problems of public education. Where the states have refused or been reluctant to meet and solve present-day problems, the Court has stepped in, always through an appeal to it, and served as arbiter.

It is clear that the Warren Court has been cognizant of a changing society; its decisions have been responsive to present-day problems. They reflect a very vital interest in minority groups in both race and religion, and they underscore the value of the dissident exercising freedom of speech and association.

The Warren Court has served this country well. At any rate, that is this writer's assessment today. It remains to be seen if history records likewise.

FOOTNOTES

[1] Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

[2] Ibid.

[3] The second Brown decision is cited at 349 U.S. 294 (1955).

[4] Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938).

[5] McNeese v. Board of Education of Cahokia, Illinois, 373 U.S. 668 (1963).

[6] New York Times, September 2, 1969.

[7] Cooper v. Aaron, 358 U.S. 1 (1958).

[8] Pennsylvania v. Board of Directors of City Trusts of the City of Philadelphia, 353 U. S. 230 (1957).

[9] Goss v. Board of Education of Knoxville, Tennessee, 373 U. S. 683 (1963).

[10] McNeese, op. cit.

[11] Griffin v. County School Board of Prince Edward County, 377 U.S. 218 (1964).

[12] Rogers v. Paul, 383 U.S. 198 (1965).

[13] Green v. County School Board of New Kent County, 391 U.S. 430 (1968).
Raney v. Board of Education of the Gould School District, 391 U.S. 443 (1968).
Monroe v. Board of Commissioners of the City of Jackson, 391 U.S. 450 (1968).

[14] Carr v. Montgomery County Board of Education, _____ U.S. _____ (June 2, 1969).

[15] Alexander v. Holmes County Board of Education, _____ U.S. _____ (October 30, 1969).

[16] School District of Abington Township, Pennsylvania et al. v. Schempp. 374 U. S. 203 (1963).

[17] Engel v. Vitale, 370 U.S. 421 (1962).

[18] Schempp, op. cit. p. 222.

[19] Ibid., p. 300.

[20] Flast v. Cohen, 392 U.S. 83 (1968).

[21] Board of Education v. Allen, 392 U.S. 236 (1968).

[22] Everson v. Board of Education of Ewing Township, 330 U.S. 1 (1947).

[23] Epperson v. State of Arkansas, 393 U.S. 97 (1968).

[24] Ibid., p. 106.

FOOTNOTES

[25] Cramp v. Board of Public Instruction of Orange County, 368 U.S. 278 (1961).
Baggett v. Bullitt, 377 U.S. 360 (1964).
Elfbrandt v. Russell et al., 384 U.S. 11 (1966).
Whitehall v. Elkins, 389 U.S. 54 (1967).
Keyishian et al. v. Board of Regents of the University of the State of New York et al., U.S. 589 (1967).

[26] Slochower v. Board of Higher Education of New York City, 350 U.S. 551 (1956).

[27] Sweezy v. New Hampshire, by Wyman, Attorney General, 354 U.S. 234 (1957).

[28] Barenblatt v. United States, 360 U.S. 109 (1959).

[29] Beilan v. Board of Public Education, School District of Philadelphia, 357 U.S. 399 (1958).

[30] Shelton v. Tucker, 364 U.S. 479 (1960).

[31] Pickering v. Board of Education, 391 U.S. 563 (1968).

[32] Tinker v. Des Moines, 393 U.S. 503 (1969).

RACIAL INTEGRATION

by

William T. McKnight

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I wish to thank George Johnson for his introduction and his reminiscenses of our past. Since our days beginning in 1943 in Washington, we have kept informed of each other's activities although we haven't had the opportunity of close contact.

We have many things in common. I haven't discussed this with him, but I think we may have a problem in common. In this world today in which colors are so important, George's wife and my wife happen to look so much like you people that it is rather hard for us to accept the word "blacks". My wife has been told to get out of neighborhoods, "whitey we don't want you".

I went back to Yale to sit on a committee three weeks ago and started talking to the Black Student Union. "We Negroes," I said, and somebody said, "Wait a minute we're Blacks." I said, "I am sorry. I was here forty years ago, we were Negroes then. I apologize."

In addressing ourselves to the subject today, to me it is a little interesting as I read the cases to see that the landmark cases are neither white nor black but Brown and Green, and somewhere in between.

As Mr. Johnson told you, little did I think that the school that I attended in my youth would become celebrated in history. I lived in a block in which we were the only Negro family and at the age of 6, when my mother entered me in Buchanan School, it didn't seem at all strange that I went to one school and all the rest of the kids in the block went to another. There were white Germans on one side and Swedes on the other. So I got my early education and got out of Kansas before I realized that I was being discriminated against. In later years I had to go back and help those who refused to go their separate ways and insisted that they all go to the same school if they lived in the same block.

I won't belabor my part of this presentation to this audience because I feel about you as I feel when I appeared before the Supreme Court. I think most of you who have followed this program through its 15-year history are probably better advised, and even the non-lawyers can cite more cases and name the judges who decided them and how they split, better than I can. So I will try to give you my impressions of many of the legal aspects of what we began to call school desegregation.

Now as I see it, there are three principal divisions in this program, each of which started with a landmark case. *Brown vs. the Board of Education* was decided in 1954 and there were three things that the case stood for. (1) Separation necessarily involves inequality. (2) Separate educational facilities are, *as a matter of fact*, invariably unequal. (3) The change from a segregated system to a unitary system should be accomplished with all deliberate speed. Thus spoke the Warren Court.

It then followed that shortly after 1954 the district courts began to wrestle with what *Brown* meant. We also know that not only the district courts but the Courts of Appeal came up with different answers.

So we went to the next phase and that was *Green vs. the County School Board of New Kent County, Virginia*, in 1968. When that case reached the Supreme Court the Justices said the question for decision is whether under all circumstances the school board's adoption of the freedom of choice plan constituted adequate compliance with the board's responsibility in accordance with *Brown*. Now, as all of you know, there are various plans presented to the District Court as to how to achieve, in some cases integration in others how to end segregation, or to desegregate the system. In Virginia as in some other states, they hit upon freedom of choice, expounding the philosophy that if a pupil and his parents could choose to go to a white school, where formerly he went to a Negro school, that would comply with the philosophy of *Brown* in that *there* was not a forced separation. But the court looked into the fact of the matter. There are statistics in the Green case to show that less than 5% of the Negroes in this particular school district chose to go to the white school. My assignment here today is to take the legal approach to this matter but as a lawyer of many years I know that it is impossible to be purely legalistic when you are dealing with human relations. What came out of each one of these situations depended primarily on the philosophy of, first, the board of education as it approached the problem and secondly, the philosophy of the judge who had to pass upon whether or not the plan submitted did comply with the rules.

The third case which to me is a landmark case is *Alexander vs. Home City Board of Education* which came up in Mississippi. This was only decided last month. The United States Supreme Court said that continued operation of segregated schools under a standard of allowing all deliberate speed for desegregation is no longer constitutionally permissible. Desegregate now! I have said to Fr. Owens and to Mr. Johnson that I had prepared what I thought was an erudite paper two months ago in which I was going to trace the course of thinking in each of the circuit courts and advise you this morning where each stood. Then, along comes the surprise! The Burger Court says, "Let's end all of it now." So there is no use in my telling you the Courts have appealed it because they have remanded all of them. They have kept jurisdiction and said, "Report to us what you have done by January 1." Some of the plans went on into 1972 and 1973. They were going to do it gradually because of the social impact on a community to radically change associations which had gone on for centuries, not decades. I mentioned Chief Justice Burger because throughout all of the decisions you must be mindful of the fact that each court, just as the Warren Court did in *Brown*, reads the same language in the constitution. The Supreme Court in *Plessy vs. Fergurson* said that you could have separation and equality and one hundred years later another court said, "no, you can't." This should be kept in mind particularly by the layman who comes to us as lawyers asking for a definitive opinion on matters. Some people think that we as lawyers ought to be able to read whatever papers you may have in hand, wills, contracts or what have you, and say that we ought to know the answer, "You're a lawyer." With all the wisdom of the nine justices on the Supreme Court, they can read the same language and come to diametrically opposite conclusions as to the meaning of the words.

One of the things to me that is most impressive was that these three cases to which I have referred as landmark cases, all were unanimous decisions of the United States Supreme Court. For an organization such as this, it should give great hope for the future in working in this field that much more can be accomplished by approaching the courts with reasonable insensory arguments and asking that the courts make dead words living deeds. Now in this field, the variety of cases that went to the district courts is most interesting. What did *Brown* mean and how much of a field was *Brown* supposed to have covered? When the court said that the school system must be desegregated, what about the teachers in the dual system? What about the equipment in the dual system? What about the location of buildings in the dual system? All of these matters have gone up to the Supreme Court for a test as to whether or not they were included.

I can say to you as a resident and citizen of greater Cleveland, the problem that we are facing today is one which up until now, should not be decided by a district court or a court of appeals or the United States Supreme Court that problem is the plight of the inner-city when the whites move out and leave the blacks. No matter how you draw the boundary lines for a school district, within that boundary line there are nobody but blacks. Your next problem as long as you have the rights of seniority among teachers, and I am looking at Jim O'Meara now, they have traditionally been privileged to select their schools after they have been assaulted two or three times in a particular school which they love. They come to the superintendent and say, "Either you transfer me, or I will go to another system in a smaller town that pays more money." This happens several times, and then you recruit wherever you can and you look back five years later at a school which had had an enviable reputation. I could name you a high school in the city of Cleveland in which any student who had a diploma could go to any college in the United States at one time. It is not true today because of the quality of teachers. Now I don't know what any court could do about it. The last time I read about this particular school in the newspaper the parents in the district were bombarding the school demanding that three other children be pulled out because they had promised them at the time they built a brand new school that the total number of students would be X number, and now they had 300 more than that. The reason they built the new school they told the people at the bond issue was to relieve overcrowding. The day they moved in they were overcrowded. So, the people are protesting, and what are the issues there? Boundary lines. Why a boundary line? A school is built within an existing boundary line. It has been there for a long time. It would be easy to say we will move the boundary line six blocks to the east. If they did that they could switch 800 or 900 children in another school which has been the center of racial conflict. If they would dump 300 black children there tomorrow, Jim O'Meara knows as well as I know that we would have to call out the gendarmes. I don't know what the Supreme Court could do about that. We have in the past 14 years been given the title of all the cases and the thinking of the Supreme Court, but I would think that right now you are principally interested in what you are going to do about the problem. It reminds me of a story they used to tell about Dr. Johnson, the last president of Fisk University. He was at such a meeting as this and two of the ladies who wanted to show they had no racial feeling and wanted to be quite friendly were discussing what they were doing about the problem. After each had finished and one said, "And what about you, Doctor?" He said, "I am the problem." You see you ask for an entirely different outlook. I have my purple heart for having had the naivety and audacity five years ago, when as the Senior Law Officer of the city of Cleveland, the then very radical organization of CORE had announced that it was going to stop the construction of the new school building on Lakeview Road. They invited all those who believed that it should be done to assemble at 12:00 noon. The Superintendent of

Schools and the Mayor of the city said, "McKnight, go out and see to it that that demonstration remains orderly." I got the inspector of the district and we set about to insure order. There were 12 Mounted Policemen and 50 foot policemen. Promptly at 12:00 the demonstrators began to assemble and march up and down very peacefully on the sidewalk. About 3:00 p.m. it got very boring and I had heard for the first time of an organization, RAM, Revolutionary Action Movement. They had stationed themselves on top of three story apartment houses on the other side of the street. They had gotten tired of seeing this aimless marching, so they began to break bottles and throw them at the horses and they hit the flanks and the blood would spurt and the horses would rear. The policemen who had ridden the same horses for 12, 15 years, loved those horses. They wanted to charge the crowd. The peaceful marchers were on the sidewalk. The other people were across the street on the buildings. To get to the people who were throwing the bottles, it was necessary to ride down the peaceful people, many of whom were nice ladies from the Heights who had come down to show that they were sympathetic to the cause. I was standing out there in charge and everybody was asking, "What are we going to do now?" I said, "Give me a bull horn!" And this is in my scrapbook. In the Chief's words, "This crowd must disperse at once, this is anarchy. I will put it down if I have to call out the National Guard." At that point a Black Nationalist stuck a knife in my back. If it hadn't been for two white detectives it would have gone on in. I just spent 5 weeks in Marymount Hospital and I haven't been back to stop one since.

Fortunately I was in Montreal when the July 23rd one happened last year. They said, "We needed you," and I said, "I wouldn't have had a job because you would have asked me to go out there and I would have gone home." As I was telling George, I have two sisters in California. One of them and I jointly own a house that my mother occupied before she died. I keep a half interest in that house in Pasadena and three one way tickets to California. The next riot I hope is on the East Side because I want to get to Hopkins Airport on the West Side. That is only because I believe that a soldier who has been in the trenches for 40 years is entitled to go to the rear lines and send up the new troops. I am hoping among this crowd the new troops are here.

We who approach this from a legal angle only do so on the factual situation existing in any community which we try to put into legal language. What we call pleading follows the briefs and arguments to convince the courts who must render final judgment. A situation does not conform to the philosophy of *Brown* if there isn't a unitary system of education which provides an education for all pupils without regard to race, color, religion, natural origin. The people in the communities have to want such a system and want it very much. Then there will be lawyers who will respond. They will go to the courts. Then we will be under obligation to represent forcefully to those courts, based on this whole line of decisions since 1954, that the goal which we seek can be achieved by an order of the court. Now before ending my part of this and opening up to the panel and I guess to your questions, I don't want you to think that I am placing all the responsibility on you, because as I look into the audience I see only one other of my color. I have to admit to you that when our daughter reached kindergarten age we moved to Shaker Heights to put her in a particular school in which we wanted her to be educated. Incidentally, at that time I was Counsel of the Cleveland Board of Education. Filing through all these things that are in my notes here and of course, and I don't say this in any manner of disdain, I was fighting for those who were not of the middle class who could not afford to move. Really that is what we are talking about. I am being very serious because most of us just move and leave the problem. Many of us, which I think is worse, lose interest in the problem. That is the course that has been followed and the cases that I cite to you are cases that have come from Connecticut, Ohio, California. We aren't talking about the South now. When we are talking about the unitary system of education, we're talking about wherever we live. In years past we in the North looked in a southerly direction and said, "We don't understand those people." Someone said in one of the conferences, and I don't say this disparagingly but to make a point, the then attorney general, Robert F. Kennedy, now deceased, said that he was for the bill making open housing. The chap sitting next to me said, "Well if I lived in his house which cost a quarter of a million dollars, I'd be for open housing too. You don't have to worry about your neighbors." So I think that our worry now is about those of us who are the great middle class. By that I am not saying that you are the silent majority, but the great middle class of Americans who do have a concern about not only their community but the future of American and the world.

RESPONSE TO McKNIGHT

by

Dr. Gordon Foster

Coral Gables, Florida

I am primarily involved in the South although a displaced Northerner as I guess most people in Miami are. Once in a while you find a native Key Wester and somebody that has lived there all their lives. At the moment I happen to be working in a place that Mr. McKnight mentioned he had a residence, Pasadena.

Pasadena is interesting. Their problems are complicated by an earthquake law ordinance field act which makes the Board liable for housing children in buildings that have been condemned as unsafe because of earthquake damage. It is overrun with portables and several of their nicer schools are being ruled out.

The best thing for me to do is to just talk around a little bit the three cases which Mr. McKnight mentioned. I certainly would agree that they are the landmark decisions and throw in a few inputs in terms of my experience and what I see going on right now. You are all aware from the radio and newspaper reports of the Fifth Circuit hearing that has just been completed in Houston. The ruling will be out, I understand, about Friday. I talked to a fellow I work with quite a bit in Houston who was one of the lawyers there and presented the *Marshall County Mississippi Case.* All lawyers in this series of cases were asked to be present and to leave proposed orders with the judges. I asked him what he thought was going to come out of the case. His own opinion, and this is just what he told me, was that probably they will follow the *Alexander Homes* business very closely in terms of timing and will ask all the districts involved to completely desegregate by December 31st.

UPSURGE AND UPHEAVAL IN SCHOOL LAW

I was in Ft. Lauderdale Monday talking with HEW Country, Broward County in Florida about the same problem. HEW has asked them to desegregate largely, not completely by December 31st. They raised the issue of Judas, "Can't we have till January 28th, when we end the semester? At that point all the grades will be in and this sort of thing. Then we can take a day or two off and get the job done rather than doing it before the end of the first semester."

The fellow from HEW seemed to be pretty happy about this, but I understand that the feeling that this lawyer had about Houston was that the judges aren't going to be very happy about it. They are going to ask the schools to telescope their educational efforts so that all the grades can be in by December 31st when they go home for Christmas. The Christmas Holidays will be used to make the change. I think it is fairly safe to say that certainly in the Fifth Circuit you will see a tremendous mass movement over the Christmas Holidays of teachers and pupils. It was felt that the judges sitting in Houston did have some concern about bussing and about cross bussing, particularly. The feeling was that in those cities where bussing was the common practice you could probably see a feeling that there would be no problem about using bussing or even cross bussing to get the total desegregation job done. After all, I think the NEA has reported something like 17,000,000 children ride the busses every morning anyway. This is a fairly common phenonomen in our cities.

There is one case which I think has some interest which has just been heard recently in California that I thought I would mention. To those of us who have been working in the field in the South, in a sense it is a landmark case. Schools have been desegregated any place in the South largely by phasing out the black schools and getting rid of the black principal or making him coordinator of federal projects or something like this. The burden of desegregation has largely been on blacks. School boards and superintendents call this the "Sunburst effect" or something. Anyway, you take the former black school and scatter the pupils out among the whites. This case, *Brice versus Landus*, in California Northern District which was heard August 8, 1969, said that the Martin Luther King High School in this district could not be closed and the blacks bussed out, that bussing of Negro children is not in itself illegal but where you have an apparently suitable black school facility and it's closed and the children dispersed that this doesn't make any sense. It does place the burden of desegregation on the blacks and in effect the white children become sort of natives in any school situation and the blacks who come in are foreigners. We find this to be true in so many districts. I think that if the courts don't begin to rule in this direction, the blacks are going to rule for them. We are finding in city after city where this is proposed as a way to solve the desegregation problems, that the blacks are taking matters in their own hands and just saying, "We aren't going to go." It is that simple. Whether the courts do it or not, I think it is going to be done illegally if not legally.

One of the problems raised by Mr. McKnight was what to do about the inner-city business. In the South most cities also have their ghettos, their black belts. The *Adams versus Mathews* case in the Fifth Circuit said that there should be no all black schools by September of 1969. There has been some dispute in the South as to just what this meant. The attorney for Dade County, which is Miami of course, Mr. Bowles, reported to the press that in his opinion this did not include cities, that this was largely a group of rural counties, the case was deciding and did not include cities like Miami. The Fifth Circuit had no intention of saying that there should be no all black schools in a city like Miami. His feeling seemed to be born out in some cases in Florida. For example, in St. Petersburg and in Orlando, the district judge in both cases indicated that this was the way he felt. At least he didn't do anything about ordering them closed. Judge Adkins in the present Miami Dade County Case has referred to the *Adams v. Matthew* case in his first order; but he hasn't indicated yet how he himself feels about this. It was thought that the city case in Houston which was heard about two months ago would resolve this, but it didn't. Houston, if you know the city, does not have any large segment of blacks in one big pocket. The blacks sort of go down through the city in a "T" shape so that it is possible to rezone and tear and group Houston's schools and desegregate the whole package without instituting a tremendous amount of bussing or cross bussing. The problem essentially wasn't really facing Houston, but I think it will be faced very seriously in Dade County in the next coupl of weeks and perhaps in Orlando, Orange County and St. Petersburg, Phenelas County. If the Fifth Circuit updates these, I am sure it will have to be faced in Dade. Now if the judge for example should rule that there shall be no all Negro schools in Dade County by December 31st, or even by Sept. 1970, then this may enable the South somehow or other to come up with some solutions to this problem because they are forced to, not that they want to, but there just is no alternative.

The biggest problem that lay people have in the South is understanding the differences between the Court procedures and the Civil Rights Acts. Their lawyers will tell them and it gets in the paper that the Civil Rights Act of 1964 specifically states there shall be no bussing instituted to achieve racial balance. They read this and say, "What in the hell is going on?" They say, "It's unconstitutional, it's illegal, it's everything else to do away with a neighborhood school to institute bussing to achieve desegregation." Most white people cannot understand the differences that the Fifth Circuit has, for example, with the Civil Rights Act. In many cases in the Fifth Circuit the judges ruled that desegregation must take place and must take place now. In so many words the judge says, "The hell, we don't care how it's done, if you want to transport the kids in row boats it is all right with us, only get it done!" To many lay people this sort of conflict is difficult to resolve. It's amazing how many people all of a sudden believe in the neighborhood school concept; it's become a very cherished thing.

St. Petersburg had an area where they had a particular problem with a neighborhood elementary school. We presented a plan to the board about a month ago. The thing was sort of all tidied up and about to end when one of the board members said that he was very interested in this and he would like to read a letter he had written to President Nixon about how he felt on the neighborhood school concept and bussing. One of Nixon's aides had written him back a nice letter saying he was all for the neighborhood school concept. It was a beautiful letter and opposed to bussing for any purposes. This was interjected into the whole press complex that was there and made some pretty interesting reading.

PANEL RESPONSE

One of the difficulties in the South has been of course that about late Spring last year the consolidated efforts of the Court and the HEW Civil Rights Division had in many cases convinced schools that desegregation was a process that was going to get accomplished fairly soon. Then all of a sudden the rug got pulled out from several districts. There was a tremendous amount of political pressure brought on school superintendents and on school boards to delay further desegregation until the political picture became a little more clear. Until *Alexander versus Homes* seemed to just recently redirect the whole effort, things have been very chaotic. Boards have been put in a very bad position in terms of doing anything, because if they did they were politically in bad shape and superintendents the same way of course. The whole process had sort of been brought to a standstill up until the recent decision.

Reference has been made to the fact that in landmark decisions the court was unanimous. There is no particular consequence, but I think it is interesting to note that the *Brown* decision was unanimous and it was written by the Chief Justice. The *Alexander versus Homes* was unanimous, but nobody wants to sign it. It was a procurian decision. There's a change in the times, that's all.

RESPONSE TO McKNIGHT

by

Dr. Robert Simpson

Coral Gables, Florida

I really wanted to talk about another case that came up at the same time as *Darrington versus the City of Portland* where they refused a topless go-go dancer's complaint that her fine by the City of Portland was a violation of her right of free expression. That was more interesting but they refused to let me do much research on it.

This is really an advance sheet, but now we are calling it a working copy. Our secretary is still back working on it. We have a problem in the State of Ohio with financing education adequately. We don't call our State universities, state supported. They are state assisted. There is a considerable difference, about $300 a student. We have had just a little problem of this reflected in getting our report typed properly. We do have a corrected copy given to Mac for the conference proceedings. I am not going to read the report to you obviously, but I would like to comment on its purposes.

One, it is to show you a chronology of this topic, Civil Rights In The Schools, from a racial standpoint. Naturally we had to start with the origin of the problem. That was in 1492. That's where all historical research starts as far as the United States is concerned. As soon as Columbus landed the first inter-racial problem occurred.

In the question about desegregation studies, North and South, we have some confusion here between the two Miami's. I am from Miami North, but Gordon attended there and he is now down at Miami South. I do quite a bit of my consulting there. On Gordon's part this is intentional because then we can give a procurian decision and each blame it on the other Miami. No one is too sure of where it comes from and this works out fine. In fact, one of my recent visits was in a school district in Mississippi where two of the board members took me out for a little trip and showed me some of the historical highlights. This was before we had gotten into any investigation of the problem. They showed me where, as they put it, a colored voting registrar had committed suicide. He must have been quite an athlete because he hung himself with his hands tied behind his back as we found out later. Also there were two white civil rights workers who disappeared in a very dense wooded area at an earlier date. So it is when someone has said, as some of my colleagues do, that teaching and education must be dull. For those of you who think it is, I would suggest that you enter this consulting field. The districts in the North have a similar problem. We do not have in the Northern districts the very few that are faced with a problem of desegregation and immediate desegregation that is present in the South. I am sure in many of the Southern cities that Gordon was talking about that the song "We Shall Overcome" will be following by "I Am Dreaming of a White Christmas" in many communities.

PANEL RESPONSE

I want to comment more about 5 knotty problems that are actually facing these districts. I comment under an unattribution policy of not saying specifically which districts they are in, but 5 comments that really are problems that we have to face. One is an interpretation from the different circuits as to how far the affirmative duty of a board goes in having to end segregation. In some, as you see here, it has even gone to the point of where they have been encouraged very strongly to work with community councils, realty boards and so forth to end neighborhood convenants or any other type of restrictive housing patterns.

Probably one of the most successful efforts nearby in this area is Shaker Hts., Ohio, where they have done a fine job in working out a problem before a court order was necessary. Yet in talking with Roger Sneed last Friday, he indicated that they still don't have integration. A second very important problem is one of financing the desegregation plan which will work; getting the money to do it. For example, we have one district that the only way they are going to end segregation and to accomplish meaningful desegregation is through a massive cross bussing program. Unfortunately, the local people will not vote it, the state will not supply the money, and yet there is an order to implement it. So here is a conflict in different state agencies, one ordering the cross bussing plan, that is the plan that will work to end desegregation, and yet the local tax payers and the state legislature refuse to grant the money to make the program possible. Third, an in-service education program is highly essential with both faculty and community. Hopefully, it can be done when you see the hand writing starting to appear on the wall, not when somebody has you up against it. The problem of changing here is in both community and staff from desegregation to integration.

I am not going to propose that I have the final definition of this, but to me, desegregation is a physical dash legal concept, one that can occur by moving bodies and changing nature's ability. Integration cannot become an actual operating value concept without this in-service training program. Without careful analysis you can achieve desegregation and you probably set integration back another generation. The last statement I make is actually a challenge to our teacher training institutions. I think darn few of them are doing much as far as the area of preparing teachers for inner-city work. Now I know some are just by the fact that the school is located in a city area, an urban area. They place their student teachers in these schools. For example, one of the larger cities in the country fired 1320 teachers that had 1320 vacancies in what they call their inner-city schools. They filled each one and then when they notified the teachers of their assignment, over 300 of them broke their contracts. Over 300 out of 1320 broke their contracts when they found out they were going to go to the inner-city schools. Out of those that went, another 200 to 250 did not end up the first year of teaching, did not finish it, did not complete it. Many of these were hired from universities in that area. I think we have a terrific challenge here both for training of teachers and training of administrators.

CIVIL RIGHTS AND THE SCHOOLS
NORTH AND SOUTH
BLACK AND WHITE,
A CHRONOLOGY

by
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I. The Early Era: From Columbus to Plessy

The early era contains primarily historic events as differentiated from legal documents. Also, as a historian, the editor was compelled to start with Columbus. This report could have started with the "Creation," but it was felt that the "church-state" argument would only confuse the issue further. While documentation is explicit or implicit in most events listed in the first era, other items are added to assist reaching

historical perspective.[1]

Even in this early period, trends and counter-trends (i.e., "confusion") are seen.

1. Pedro Nino–a Negro–was one of Columbus' pilots (1492).
2. First revolt of slaves occurred in the area that is now South Carolina (1526).
3. In Virginia, first segregated public schools opened for Negroes and Indians (1620).
4. Lord Mansfield, in England's Somerset case, ruled against slavery. This prompted efforts for anti-slavery legislation in New England (1772).
5. Continental Congress ended importation of slaves. (1774).
6. Benjamin Franklin elected first president of the first "abolition society," a Quaker organization (1775).
7. "Declaration of Independence" adopted, after considerable debate, without a stated position on the issue of slavery (1776).
8. Vermont becomes the first state to abolish slavery (1777).
9. *Constitution of 1787* provided that the importation of slaves could not be prohibited for twenty years. In 1808, Congress legislated against importation but trade continued until the 1860 era. Some areas abolished slave trade between 1808 and 1861; e.g., the District of Columbia in the Compromise Act of 1850.
10. Missouri Compromise (1820).
11. *Roberts v. City of Boston*, 5 Cush. 198 (Mass., 1849) The first journalized case on the topic approved the "separate but equal" doctrine for schools. Arguments sounded *circa* 1969.
12. Omnibus Bill of 1850. It was also known as the Compromise Act of 1850 (see item 9, *supra*).
13. First Negro college–Ashmond Institute (later, Lincoln University)–was established in Chester, Pa. (1854).
14. *Dred Scott v. Sanford*, 19 Howard 393 (1857). Held that Negroes could

not become citizens of the U. S. nor were they entitled to the rights and privileges of citizenship. The Court also ruled that the Missouri Compromise, which had banned slavery in the territories, was unconstitutional. It was one of the most disastrous decisions handed down by the United State Supreme Court.

15. *13th Amendment.* "Emancipation Proclamation—signed (1863) Section 1 (1865). Neither slavery nor involuntary servitude except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Section 2. Congress shall have power to enforce this article by appropriate legislation.
16. Ku Klux Klan organized in Tennessee (1865).
17. *14th Amendment.* (1868) The most important provisions of this post-Civil War Amendment are those that forbid a state to deprive any person of life, liberty, or property without due process of law, or to any person the equal protection of the law. The equal protection clause has been invoked to restrain racial segregation practices and to maintain fair legislative apportionment by state governments.
18. Civil Rights Act of 1870.
19. Civil Rights Act of 1871.
20. *Washington A & G Railroad Co. v. Brown,* 17 Wall (US) 445 (1873). Surprisingly, in a railway car accommodations case (pre-Plessy), the "Separate but equal" principle was found to be unconstitutional.
21. Civil Rights Act of 1875 guaranteed equal accommodations.
22. *Strauder v. West Virginia,* 100 U S 303 (1880).
23. Post-War lynchings reached peak (1890).

Thus, even in the early era, compromise, confrontation, and confusion existed. Racism and black militancy can be found. As is known today, it appears that lip-service and legislation were insufficient efforts for achievement of equal opportunity. Court enforcement had to be increased, and it was during the next era.

II. Increased Court Interest: From *Plessy* to *Brown*

The cases of this period indicate that the races deserved equal treatment but such service could and, even, should be in separate facilities: schools, vehicles or services. As long as separate facilities were provided, federal courts tended to accept this act by a state as *prima facie* evidence of equal opportunity or treatment and, therefore, not review petitions for relief.[2]

24. *Plessy v. Ferguson*, 163 U S 537, 16 SCt 1138 (La. 1896). A state law requiring segregation of the races in public transportation was upheld. It established the "separate but equal" doctrine at the federal level. Justice Harlan dissented, saying, "Our Constitution is color blind."

25. *Cumming v. County Board of Ed.* 175 U S 528, 20 SCt 197 (Ga. 1899). First U.S. Supreme Court case applying "separate but equal" doctrine to public schools. In this case, Justice Harlan, the dissenter in Plessy, upheld closing a Negro school for "economic reasons" primarily because the request for injunctive relief was poorly structured as to appropriate constitutional grounds.

26. *Bera College v. Commonwealth of Kentucky*, 211 U S 45, 29 SCt 33 (1908). The Supreme Court upheld a state statute forbidding integrated enrollment in a private school.

27. *Gong Lum v. Rice*, 275 U S 78, 48 SCt 91 (Miss., 1927). The U. S. Supreme Court upheld school officials' assignment of a Chinese-American child to a "colored" school as not denying equal protection of the law—as long as equal facilities were provided.

28. *Norris v. Alabama*, 294 U S 587 SCt 579 (1935). Negroes could not systematically be excluded from jury service by state action.

29. *Missouri ex rel. Gaines v. Canada*, 305 U S 337, 59 SCt 232 (1938). The state could maintain equal protection of law in using separate but equal educational facilities only if such facilities were under its (the state's) jurisdiction. The state could not pay a Negro's tuition to a college in another state in order to satisfy "equal protection" requirement within its

own jurisdiction. See *Sweatt v. Painter*, item 33, *infra.*

30. *Alston v. School Board of City of Norfolk*, 311 U S 693, 61 SCt 75 *(Va. 1940). Equally qualified black and white teachers, though assigned to segregated schools, must be paid equal salaries. Appeals court decision, see 112 F. 2d 992, stands because of refusal to grant *certiorari.*
31. *Sipuel v. Board of Regents*, 332 US 631, 685 SCt 299 (Okla. 1948). Upheld *Gaines* rule, No. 29, *supra.* Mandamas will lie to compel admission to the school.
32. *McLaurin v. State Regents*, 339 US 637, 70 SCt 851 (Okla. 1950). The states requiring a Negro student to occupy a classroom seat in a row specified for colored students, or a seat at a designated table in the library or in the cafeteria, violated the equal protection of the laws clause of the Fourteenth Amendment.
33. *Sweatt v. Painter*, 339 U S 629, 94 L Ed 1114, 70 SCt 848. A state must provide a legal education, comparable in equality, to a Negro applicant as it does for applicants of any other group.
34. *Gonzales v. Sheely* (DC Ariz.), 96 F. Supp. 1004. On segregating school children of Mexican descent or Indians, the court held that the same principle applied in Brown applied, forbidding states from segregating school children according to their national origin. Mere language deficiency is not grounds.
35. *Bolling v. Sharpe*, 347 U.S. 497, 98 L Ed 884, 74 Sct 693, 1954. Racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment.
36. *Florida ex rel. Hawkins v. Board of Control*, 347 U S 971, 98 L Ed 1112, 74 SCt 783. The Fourteenth Amendment forbids states to exclude Negroes because of their race or color from law schools. Judgment, vacated, and case to be decided in light of *Brown.*

In the preceding era, the trend goes from separate seats in a public conveyance into separate schools to separate seats in the same classroom. Though this is an obvious oversimplification, the prevailing attitude accepted physical rather than philosophical concepts.

III. The Modern Era: Since *Brown*

The 1954 Brown decision established that the dual school system, separated on the basis of race, was contrary to the federal constitution.[3] In 1955 Brown decision, local boards and local courts were given the duty of accomplishing desegregation.[4] Many subsequent cases have failed to end school segregation throughout this country. Until 1964 the initiatory responsibility rested with local parties. The date when full integration is a matter of conjecture, possibly when we all are "tea-colored" as Philip Wylie stated. When law conflicts with community policy, progress is slow and painful. It was ten years after Brown before legislation gave federal government any power over school attendance patterns.

From the listing of cases, *infra*, it is obvious that this is the largest era; for many, it has been the longest. One school administrator taking a course in school law, was asked, "What was the *Brown vs. Topeka* decision?" The unmet demands upon professors of school law was evidenced in the reply, "I think it was Topeka, 14 to 17."

37. *Brown v. Board of Education of Topeka*, 347 U S 483 (1954); 74, SCt. 686, 349 U S 294 (1955). The U.S. Supreme Court in 1954 overruled the "separate but equal" that had been in effect since 1896. In 1955, the Court ordered desegregation to proceed "with all deliberate speed."
38. *Briggs v. Elliot*, 132 F. Supp. 776 (1955). The Fourteenth Amendment does not require that a state must operate racially integrated schools, but only that any school it operates, maintains, or supports, be open to all, regardless of race.
39. *Lucy v. Adams*, 350 U.S. 1, 100 L Ed 3, 76 SCt 33 (1955). The Fourteenth Amendment forbids states to exclude Negroes, because of their race or color, from state undergraduate schools. (The "Little Rock" case).

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40. *Clemons v. Board of Education* (CA 6 Ohio), 228 F 2d 853, *cert den* 350 U.S. 1006 (1956). The Fourteenth Amendment prohibits states from gerrymandering school attendance zones in such a manner as to effect racial segregation in the public schools. An injunction must issue upon a finding that such steps were taken to disguise segregation policy.

41. *Jackson v. Rawdon* (CA 5 Tex), 235 F 2d 93, *cert. den.*, 352 U.S. 925, 1 L Ed 2d 160, 77 SCt 221 (1956). A school board must act promptly to abolish segregation in the public schools and cannot be influenced by opinions that the community is not, psychologically, ready for the change.

42. *Florida ex rel Hawkins v. Board of Control*, 350 U.S. 413, 100 L Ed 486, 76 Sct 464, reh. den., 351 U S 915, 100 L Ed 1449 76 SCt 693 (1956). There is no reason for delay in the admission of qualified Negroes to graduate professional schools.

43. *Booker v. Board of Education* *(CA 6 Tenn), 240 F 2d 689, *cert. den.*, 353 U S 965, 1 L Ed 2d 915, 77 SCt 1050 (1957). The Fourteenth Amendment forbids states to exclude Negroes because of their race or color from state colleges, not withstanding shortage of space.

44. *Borders v. Rippy* (CA Tex), 247 F 2d 268 (1957). In implementing desegregation of public schools, the district court must retain jurisdiction to require good faith compliance with its decree, even though the school board has made a prompt and reasonable start and is proceeding to a good faith compliance at the earliest practical date, and this obtains even if compliance causes conflict with state and law.

45. *Allen v. County School Board* (CA 4 Va) 249 F 2d 462, *cert. den.*, 355 US 953, 2 L Ed 2d 530, 78 SCt 539 (1957). If a reasonable start is made toward desegregation with deliberate speed, considering the problems of proper school administration, it is not necessary to desegregate all grades at once.

46. *Orleans Parish School Board v. Bush* (CA 5 La) 242 F 2d 156, *cert. den. 354 U.S. 921, 1 L Ed 2d 1436, 77 SCt 1380 (1957).* Administrative remedies under pupil placement or pupil assignment laws are inadequate

where, under the state constitution and statutes, assignments can be made only on the basis of separate schools for white and colored children. Such are contrary to amendment 14.

47. Civil Rights Act of 1957. A major breakthrough occurred in positive federal action in the field of civil rights. The Act is based on the theory that if the Negro is protected in his voting rights, he will be in a better position to seek reform in other areas of discrimination.

48. Civil Rights Commission was established by the federal Civil Rights Act of 1957, and given strength by the Civil Rights Act of 1964. By 1964, it became a national clearing house for civil rights information.

49. *Kelley v. Board of Education* 159 F. Supp 272 Tenn. (1958). A state school preference law, authorizing local boards of education to provide separate schools for white and Negro children, whose parents voluntarily elect that such children attend school with members of their own race, is unconstitutional.

50. *Cooper v. Aaron*, 358 U S 1, 78 SCt 1401 Ark. (1958). Hostility to racial desegregation is not a factor to be considered in determining whether school desegregation may be delayed.

51. *Shuttlesworth v. Birmingham Borad of Education*, 162 F. Supp. 372, aff'd., 358 U.S. 101, 3 L Ed 2d 145, 79 SCt 221 (Ala. 1958). It will be presumed that a statute constitutional on its face will be so administered, but if not so administered, it may subsequently be declared unconstitutional in its application.

52. *Kelley v. Board of Education*, 270 F 2d 209, *cert. den.* 361 U S 924, 4 L Ed 2d 240, 80 SCt 293 Tenn. (1959). Under proper circumstances, desegregation may proceed, on the basis on one school grade per year, to be integrated, commencing with the first grade.

53. *Parham v. Dove* 271 F. 2d 132 Ark., (1959). A pupil placement act constitutional on its face cannot, by administrative action be made to maintain or effect racial segregation.

54. Civil Rights Act of 1960. This law was designed to secure the right to vote

for Negroes and to meet problems arising from racial upheavals in the South.

55. ***Farley v. Turner*, 281 F. 2d 131 Va., (1960). A pupil placement act constitutional on its face but so applied that applications by Negro children to attend white schools are routinely denied until a written protest is filed and a hearing is held, and no reason other than the applicant's race is assigned or can be found for initially denying the application, and which results in no Negro child going to public school with a white child, is unconstitutional.**

56. ***Taylor v. Board of Education*, 294 F 2d 36, *cert. den.*, 368 v 940 7 L Ed 339, 82 SCt 382 N. Y., *(1961). A policy requiring all children to attend the public school in their neighborhood violates the Fourteenth Amendment where the basis for districting aims toward substantially segregated schools.**

57. ***Bush v. Orleans Parish School Board*, 188 F Supp 916, aff'd., 365 U.S. 569, 5 L Ed 2d 806, 81 SCt 754 La., (1961). State legislation freezing the public school enrollment on a segregated basis, prohibiting transfers, closing any school under court order to segregate, and providing that integrated schools shall not be accredited, that their teachers shall lose their teaching certificate and that their students shall receive no promotion or graduation credits, is unconstitutional.**

58. ***Hall v. St. Helena Parish School Board*, 197 F Supp 649, aff'd 368 U.S. 515, 7 L Ed 2d 521, 82 SCt 529 La., (1962). A state statute providing for the closing of public schools because of the presence therein of children of different races is invalid if, at the same time, the state keeps other public schools open on a segregated basis, because such a statute discriminates against all children, white and Negro, in the locality where the schools are closed.**

59. ***Bell v. City of Gary*, 324 F 2d 209 (Ind., 1963). School not at fault for residential problem.**

60. ***Potts v. Flax*, 313 F 2d 284 Tex. (1963). Administrative remedies need**

not be pursued where schools are operated under a policy of segregation. Exhausted prior to seeking court relief.

61. *Goss v. Board of Education,* 373 U S 683, 10 L Ed 2d 632, 83 SCt 1405 (1963). The recognition of race as an absolute criterion for granting transfers is unconstitutional. Student may not be transferred to school where his race is in majority, if transfer is on race alone.

62. *Watson v. Memphis,* 373 U.S. 526, 10 L Ed 2d 529, 83 SCt 1314 Tenn., (1963). The concept of deliberate speed does not countenance indefinite delay in the elimination of racial barriers in schools.

63. *Heart of Atlanta Motel v. U.S.* 379 U S 241 Ga., (1964). The constitutionality of Title II of the Civil Rights Act of 1964, namely a provision barring discrimination in restaurants, hotels, and other places of public accommodation, on the ground that it is a valid exercise of federal power to regulate interstate commerce, was upheld.

64. *Goss v. Board of Ed. of Knoxville,* 373 U.S. 683 Tenn., 83 SCt 1405, (1963); again 406 F. 2d 1183 (6th Cir. 1969). Court of appeals judgment was reversed since transfer plans were based on racial factors that would forward student segregation by race. (*Brown* upheld). See also *Robinson v. Shelby County Bd. of Ed.*

65. The Civil Rights Act of 1964 outlawed arbitrary discrimination in voter registration and discrimination in public accommodations; authorized the national government to bring suit to desegregate public facilities; extended the life of the Civil Rights Commission; provided for withholding of federal funds for discriminatory programs established the right to equality in employment and established a Community Relations Service to help resolve civil rights problems.

66. *Griffin v. County School Board,* 377 U.S. 218 (1964); 363 F. 2d 296; 239 F. Supp. 560; 296 F. Supp. 1178 Va., (1969). Schools cannot be closed when faced with an order to desegregate; they must provide petitioners the kind of education generally given in the State's public schools.

67. *Bradley v. School Board,* 382 U.S. 103 (1965) 86 SCt 224. Re: school desegregation plans for Hopewell and Richmond, Va. Petitioners (Parents and pupils) were entitled to full evidentiary hearing on the allocation of faculty on alleged racial basis. Cert. granted. (Judgement vacated and remanded).

68. *Heirs v. Brownell and Board of Ed. of Detroit,* 136 N.W. 2d 10 (Mich., 1965). Parents brought action against the school board and superintendent for injunctive relief against the transfer of students from one elementary school to another where deemed administratively essential. The court refused to grant the injunction. (Judgment affirmed on appeal.)

69. *Wanner v. County School Board of Arlington County,* 245 F. Supp. 132 Va., (1965). The court ruled that all children, colored and white, must be admitted on a nondiscriminatory basis. The court agreed that the placement method in this case was unconstitutional.

70. *Yarbrough v. Hulbert* – West Memphis School District No. 4, 243 F. Supp. 65 (Ark., 1965). "Freedom of choice" desegregation plan constitutionally was permissible.

71. *Deal v. Cincinnati Board of Education,* 244 F. Supp. 572 (S.D. Ohio, 1965). In a *de facto* segregation case, the court granted defendent's motion for summary judgment on grounds plaintiff failed to establish that a policy of segregation or gerrymandering actually existed, or that in any other way defendant's rights under the Constitution were violated by the school board.

72. *Offermann v. Nitkowski,* 248 F. Supp 129 N.Y., (1965). The court rejected the idea that all official actions must be "color blind" and held that the 14th Amendment prohibits invidious discrimination; it does not bar cognizance of race in a proper effort to eliminate racial imbalance.

73. *Olson v. Board of Education, Union Free School District No. 12,* 250 F. Supp. 1000 N.Y., (1966). In a *de facto* segregation case, desegregation was a legitimate purpose for using buses, the court held that the State Commissioner's order to reorganize attendance zones and to correct racial

imbalance was not unconstitutional. *Swann J. Charlott–Mecklenburg Bd. of Ed.* 369 F 2d 29 (4th Cir., N.C. 1966).

74. *U.S. et al. v. Jefferson County Board of Education et al.* No. 380 F 2d 385 1966-67. Now after twleve years of snail's pace progress toward school desegregation, courts are entering a new era. The clock has ticked the last tick for tokenism and delay in the name of 'deliberate speed.'

75. *Clark v. Board of Ed. of Little Rock School District,* 369 F. 2d 661 (1966) Freedom of choice plan was upheld.

76. *Steele v. Board of Public Instruction of Leon County, Florida,* 271 F 2d 395 (1967). Motion made to accelerate desegration plan granted.

77. *Lee v. Macon County Bd. of Ed.* 267 F. Supp. 458, Aff. 389 US 215 (Ga. 1967). Racial distribution must be considered in selecting school sites and erecting buildings.

78. *Mason v. Flint Board of Ed.* 149 N.W. 2d 239 Mich., (1967). Court held the intent of the Board was to attempt, in good faith, to provide equal educational opportunities by its corrections of racial imbalance.

79. *Penn Human Relations Commission v. Chester School Dist.,* 233 A 2d 290 (1967). The court opined that, today, convenience is the most common justification for school attendance zones and the neighborhood schools which encompass a homogeneous racial, and socio-economic grouping is the very antithesis of the common school heritage.

80. *Hobson v. Hansen* 269 F Supp. 401 (Wash. D. C., 1967). Ability "tracks" caused discrimination in that students were frozen into their tracks early in their career. The District also operated "black's", "white" schools, spending more per pupil in the latter. Affirmed in *Smuch v. Hobson* 408 F 2d 682 (1969).

81. *Monroe vs. Board of Commissioners, City of Jackson,* 88 SCt 1700 (Tenn. 1968). Free transfer plans are acceptable to the court only if they work to end segregation.

82. *Sanders v. Ellington,* 288 F. Supp. 937 (Tenn., 1968). Action was brought to enjoin expansion of the Nashville Center of the University of Tennessee

on the grounds it perpetuated a segregated system. While complaint was dismissed, defendant was required to submit a plan to implement desegregation within the University.

83. *Mills & U.S. v. Polk Co. Bd. of Ed.* 395 F 2d 66 (CA5, Fla. 1968). Same as *Less v. Macon.*

84. *U. S. v. Elloree School District No. 7 Orangeburg County, S. C.,* 283 F. Supp 557 (1968). Freedom of choice desegregation plan as operated in this school district was upheld.

85. *Carr v. Montgomery County Board of Education,* 289 F. Supp 647 Ala., (1968). The school system was warned that unless its "freedom-of choice" plan works, other means to assure integration will be required. Reh. den. 402 F 2d 782 (1968).

86. *Adams v. Mathews,* 403 F 2d 181 (5th Circ., 1968). Board has affirmative duty to develop plans to end desegregation.

87. *U. S. v. School District 151, Cook County* 404 F 2d 353 Ill., (1968). First northern federal decision to put affirmative duty upon board also ruled against faculty segregation.

88. *Knowles v. Board of Public Instruction of Leon County, Florida,* 495 F. 2d. 1206 (5th C. 1969). Individual Negro teacher denied she had a legal right to be transferred to a white school.

89. *Freeman v. Gould Special School District,* 405 F. 2d 1153 (1969). Court held the failure to renew contracts for six Negro teachers was not based upon racial discrimination and dismissed the action.

90. *U. S. v. Board of Education Lincoln Co.,* 295 F. Supp 1041 (Ga., 1969). State law giving scholarship grants for attendance at private schools declared unconstitutional.

91. *U. S. vs. Montgomery Co. Bd. of Education* 23 L Ed 253 (Ala., 1969). Supreme Court ordered each school's faculty balance to approximate district wide ratio.

92. *Alexander v. Holmes Co. Board of Education.* U.S.SCt Case 632 decided October 29, 1969. " 'All deliberate speed' for desegregation is no longer

constitutionally permissible."

"The obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools."

93. *Henry v. Claricsdale Mun. Sep. School District* 409 F 2d 597 (5 Cir., Miss. 1969).

94. *Coppedge v. Franklin County Bd. of Ed.* 293 F. Sup. 356 (1968). Federal benefits (money) follow the child in desegregation transfers.

95. *Pate v. Dade County Bd. of Ed.* (S.D. Fla. Mimi Div. No. 69-1020-CIV-CA) 8/29/69.

96. *Green et. al. v. County School Bd. New Kent County* et al. 391 U.S. 430 (CA 4 Va. 1968). Federal district must judge segregation plans in terms of effectiveness and retain jurisdiction till plan works.

97. *U.S. v. Montgomery County Bd. of Ed.; Carr v. Montgomery County Bd. of Ed.* 37 Law Week 4461 (5 Cir., Ala 1969). District Court may require desegregation of school faculties on quota basis equal to community black-white ratio; ad interim may use reasonable mathematical ratio. Same as *Cleveland v. Union Parish School Bd.* 406 F. 2d 1331.

98. *Brice v. Landil* CA 61805, (No. Dist. Calif. 8/8/69). Can't close black school strictly on preference to keep white school open and move in blacks–seemingly as 'guests'.

99. Bd. of Public Inits., Palm Beach Co. v. Colen (Secy HEW) 413 F. 2d 1201 HEW deferred of federal funds because of unsatisfactory progess on desegregation, was not a "refund of assistance" under Civil Rights Act, which would have required hearing and finding–then not violate due process.

IV. Epilog

Indeed, today, black and white blend to gray in any review of the various federal circuits' positions on school desegregation. Here is an example of what Lloyd McCann would have called a "frontier of law." I am sure Bob Drury would have added, "Teachers now have to realize that 'up against the wall' doesn't call for a spelling bee."

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The history of litigation from *Plessy* through *Brown* to the present kaleidoscope adds to the growing misery of school leaders. While the legal-physical act of desegregation is difficult, the value of structure of integration is finding new opposition among many black communities who want their school separate but better and to have neighborhood control of school governance. A 1967 Report of the United States Commission on Civil Rights gives interesting data.[6]

Although integration efforts are frequently initiated in the early grades, the Report indicated that 65 per cent of the nation's black first graders attended black schools—i.e., schools with over 90 per cent black enrollment. Similarly, 80 per cent of the white children attended first grade in white schools. This situation is more extreme in the large urban areas when the center city is compared with its suburbs.[7] As soon as a school hits the 50 per cent black level, the rate of "white flight" accelerates till the school reaches the 90+ per cent black level. There appears to be no correlation between racial trends and size of the city. "Not only are Negroes concentrated in central cities, but they are segregated within them."[8]

> The rising Negro school enrollment, combined with only slight desegregation, has produced a substantial increase in the number of Negroes attending all-Negro or nearly all-Negro schools in Southern and border State cities.[9]

The obvious root of the problem lies in residential patterns. While racially-oriented zoning ordinances have long been unconstitutional,[10] private convenants, also unconstitutional,[11] have continued to keep residential areas segregated. If one cares to sue, damages can be collected when one is barred from a neighborhood because of racial restrictions.[12]

While case law has ruled against discriminatory realty practices before *Brown*, community patterns change slowly, and various devices including eminent domain[13] and unwritten agreements are used.

Another dimension is witnessed in the trend of increasing white enrollments in the non-public schools.

Student demands, teacher strikes, taxpayers' revolts needn't have the fourth horseman of racial unrest to concern school leaders. These, plus prostate trouble, the superintendent can forego. The problems are here and have some common derivations. Educationally, certain changes have to be made; until they are, that law must be relied upon as a guide to conduct. It behooves each school leader to know his rights and responsibilities under the law in dealing with militancy, confrontation, and even rebellion.

The problems are insoluble under the existing confusion. Some current examples are given. One urban district has been ordered to desegregate its schools. Because of topographical and realty patterns, this can only be accomplished by a massive cross-bussing program. The state will not provide the funding for the added bus service nor will the local electorate. Yet, the order still stands.

Another district is ordered to completely desegregate its elementary schools by the end of the current semester (mid-year).

Still another district is under court restrictions in the selection of a new site. Here, the problem appears to be not black or white but green: two school board members have a substantial interest in one of the sites—the most expensive one. A fourth school board makes an effort to desegregate its schools on its own rather than act under the onus of an imminent order. A neighboring district delays action through litigation. The President of the United States appears to back down from enforcing desegregation via busing programs. Next, the first school board is ousted from office and white conservatives replace the members.

Currently, freedom-of-choice plans appear to be accepted by the federal administration as being a satisfactory action by local districts. The federal courts have ruled that such plans are acceptable only if they accomplish desegregation. The U.S. Civil Rights Commission has criticized the Executive branch for the apparent slowdown and laxity connected with desegregation efforts.[14]

This criticism concluded:

> We speak out now since we believe our Government must follow the moral and legal principles and promises on which our Constitution and laws are based and meet the high expectations to which the people of this country have addressed themselves.[15]

The above documentation and commentary constitute a complex problem to which school leaders and board attorneys must address themselves. Court action and state legislation are two torturous avenues toward solutions. One student of school law inquired if the search for a solution might not be a worthy project for NOLPE. The question is transmitted here.

Two items are submitted in the appendices to promote further discussion. The first is a document distributed by black students to an urban board of education. The second appendix represents the reaction of the teachers' group to the students' demands.

The appendices are edited sufficiently "to protect the innocent," if there are any remaining.

Your reactions to this presentation are solicited.

Appendix A

Representatives of the Black Student Union (of X, Y, and Z High Schools) addressed the Board of Education on September 18, 1969, and presented the following demands to the Board:

1. Vocational training plan for grades 9 through 12 with the 11th and 12th grades working part time and going to school part time (similar to the program now in effect at "A" Co-op) and also that a job would be available for them after graduation.
2. That five (5) adults be employed to patrol the schools and be paid $100.00 per week for their services. A list of names for these positions to be submitted.
3. The right to request a budget, to keep reports on how money is spent and the right to examine said reports.
4. Free access to the Public Address system.
5. The right to add to or change any demands.
6. Freedom of movement in schools.
7. Demands must be met by date of next Board meeting.
8. The pregnant girls that return to school be given the same opportunities as other girls. (To participate in all school activities)
9. That the 11th grade history classes be made aware of Negro history.
10. Mandatory that all schools have black history courses.
11. Change white history courses to black history courses.
12. All courses taught, by black instructors, to receive full credit.
13. Outlaw present grading system–A through F not good.
14. Eliminate suspension of students, help them instead, suspend only when necessary.
15. That pregnant girls be permitted to remain in school as long as possible.
16. Demand the name of X and Y High Schools be changed to the name of a Negro person.
17. Board to meet with Student Union representatives once a month for at least a two-hour session.
18. Request a true evaluation of the teachers and would like to select their teachers.

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19. That teachers should not be given an increase in salary until they qualify as a good teacher.
20. Black principals and black teachers should be responsible to black persons only, no white person. People are responsible only to those they serve.
21. The Student Union to become a part of the "area" Planning Council and have a voice in the meetings.
22. Want Mr. B. (local, black militant) as their only advisor with no interference from the Board.

Appendix B

BLACK STUDENT UNION DEMANDS

The local CTA strongly supports the immediate establishment, within each school, of precedures that would allow for a more effective means for students to communicate their opinions and concerns.

Students should have the right to express their views, opinions, and suggestions without reprisal. It is necessary to have student involvement and cooperation in the development of some school policies. However, with this right there also comes a responsibility. It is the responsibility of the students to insure that their suggestions and opinions have been formed with careful thought and consideration as to their reasonableness and their validity. The twenty-two demands from the representatives of the Black Student Union of X, Y, and Z High Schools do not indicate that responsible thought was used in their formation. Only a few of the demands bear consideration, those being:

(1) Vocational training plan for grades 9–12
(2) That all 11th grade history classes be made aware of Negro history
(3) All schools should incorporate black history into their

curriculum

The remaining nineteen demands considered in their entirety, would do nothing but set back, considerably, what gains have been made to this point to insure a quality integrated education for each student.

A number of the demands tend to favor separatism of black and white students and teachers. It is unquestionably unrealistic to consider separatism as a means to obtain quality education. It is imperative that people of our society learn to live together and judge each other, not on the basis of color, but on the basis of character; ones individual value as a unique human being. It is for these reasons that the local CTA urges, most vigorously, the rejection of all the demands made on the Board of Education by the Black Student Union of X, Y, and Z High Schools, with the exception of the three mentioned items.

T. C., President
Local Classroom Teachers' Assn.

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FOOTNOTES

[1] For a complete chronology see Irving J. Sloan, The American Negro—A Chronology and Fact Book, Dobbs Ferry, N. Y.; Oceana Publication, 1965.

[2] Seventy years later (1969) the "suparate but better" principle awaits court review.

[3] An interesting case, missed in many reports, later established that such dual systems based upon religious preferences were also contrary to federal guarantees, using Brown as precedent. (Moore vs. Mercer County. 330.0.2d 406 (Ohio, 1965)

[4] In this paper, "desegregation" is seen as a legal action while "integration" is visualized as a policy (value) statement.

[5] See AASA Hot Line, Oct.–Nov. 1969, Vol. 2, No. 10, P. 1.

[6] The Commission, Racial Isolation in the Public School. Vol. I, Washington: Government Printing Office, 1967.

[7] Ibid., pp. 2-3.

[8] Ibid., p. 12.

[9] Ibid., p. 10.

[10] Buchanan v. Warley, 245 U.S. 60 (1917).

[11] Corrigan v. Buckley, 271 U.S. 323 (1926); Shelley v. Kraemer, 334 U.S. 1 (1948), and Hurd v. Hodge, 334 U.S. 24 (1948).

[12] Barrows v. Jackson, 346 U.S. 249 (1953).

[13] Land condemnation to eliminate threat of black family from moving into a white neighborhood was deemed unconstitutional. City of Creve Couer v. Weinstein, 329 SW 2d 399 (Mo. 1959).

[14] "Text of Civil Rights Commission Statement on School Desegregation," The New York Times, Sept. 13, 1969, p. C-6.

[15] Ibid.

A LOOK AT CITY ADMINISTRATION

by

Paul W. Briggs

Superintendent, Cleveland, Ohio

I would say that while Jim O'Meara and I do sit around part of the time on opposite sides of the table, I think that the enterprise of education is such that there really is only one side to the table. Sometimes what we are really talking about is different ways of actually improving education. Those who administer schools today don't have the kind of autonomy that they tell me used to be so free in the good old days. The system of negotiation, the system of bargaining, the system of grievance procedures to a great extent is nothing more than a system of communication and it is one that has pretty much grown up around frankness and straight forward operation. I think the days of intrigue and trying to play it cute have gone and in school systems where it hasn't gone, Jim, are the school systems that are in real deep trouble. Not that we are out of trouble, but we certainly are frank and I think we have almost exactly the same information on every problem. There is no problem that does not get a thorough airing at least once a month as we sit down around the table and talk about the problems that we are facing. I think it is because of those monthly meetings that we appear to be moving along a rather smooth course.

I am especially privileged to be on a program that allows me more time to talk with my friend Bill McKnight than I have had for a couple of years. We talk often, but not for very long and usually by phone. Here today we had an opportunity to be seated together. Bill McKnight is one of our distinguished citizens and one of the first Cleveland attorneys that I became acquainted with. He is an individual that holds my highest total respect because he is a professional and he knows what he is doing. He and I went through some real interesting days that he will never forget and I will never forget. Some of the overtones were racial, but Bill McKnight, and, I hope, Paul Briggs, looked at their problems not with a racial approach, but rather as individuals who attempted to honestly and properly solve problems.

Now I don't know what a Superintendent of Schools can say at a meeting like this that would be important. I think that I might make the largest contribution by taking a quick look at the administration of an urban school system with you very briefly and pin point some of the things that we are attempting to do and some of the real problems that we have that all of society is going to have to address itself to before we get out of trouble.

Yes, Jim, I came out of the quiet welfare state of the North, Michigan, where I served the school system for many years. I came to Parma, which is right up against the city limits of Cleveland and stayed there for seven years. Then I moved into the city of Cleveland.

The trip from Parma to Cleveland is the longest trip I have ever taken in my life. It was a trip through an iron curtain. Although I lived right next door to Cleveland, I had not seen any of the problems of Cleveland; I did not understand the problems of Cleveland; I did not see the issues of Cleveland; and I had no comprehension of the magnitude or the kinds of administrative problems that an urban school system has. That is my excuse for being crazy enough to take the superintendency of the city.

I had several psychiatrists call me and offer their immediate services because they knew that anybody who would have taken on the administrative job of an urban school system ought to have some kind of attention. Of the ten largest cities in the United States there is no one in the superintendency who was there ten years ago or six years ago. Over half of them changed in the last three years.

Why the turnover? I think that we are dealing with problems and with social change at a time when it is almost impossible to satisfy the various forces that seemingly have to be satisfied. And I would like to take just a couple of minutes to give you a profile of a city, because our city is not much different from the other large cities. And you must understand the profile if you are going to understand the kind of administration that you must count to meet the needs of the city.

The City of Cleveland is not much different than the other cities of the North; it is quite different from the cities of the South. When we look back over this town not too many years we find that in the center city there were residential areas that were built by great prestigious families, areas where families such as the Rockefellers lived, areas of prestige, the carriage trade. You can see the relics as you go down Euclid Avenue. But what happened in Cleveland and every place else? We left our cities. We abandoned the central section of the cities as we attempted to flee to suburbia where we could have larger lots, a place to park our two or three automobiles and a place for a swimming pool. For several decades as suburbanites made their livelihood in the city, they didn't see what happened to the old neighborhood. They didn't see what problems were created. They didn't understand it, and they still don't. This morning, 270,000 people drove by automobile into the City of Cleveland. They started about 7:00 a.m. and they hit the peak about 8:15. If you doubt the number, hit any of our roads coming into the city of Cleveland about 8:00 or 8:15 in the morning. About 3:30 this afternoon they will leave the city again, having made their living here today. But they have gone over the problem or under the problem or around the problem and haven't seen it. So let us take a look at what has happened.

Since 1950 in the city of Cleveland we have lost one hundred thirty thousand residents, but the Cleveland schools gained 53,000 children—a fifty per cent increase in enrollment while the population went down. In the area of Glenville where you teach Jim, in 1945, there were only 5,000 students in all the Glenville elementary schools. Somebody should have seen that something was happening because 2660 children were in the kindergarten. By 1965 that 5,000 in the elementary schools had grown to 16,800. The area of Hough, two and a quarter square miles, where for 50 years three elementary schools were comfortable, ended up with over 10,000 students in eleven elementary schools. Something happened.

Well now it wouldn't be too bad if the problem was just numbers of people. But during that same time what happened to dollar expenditures for education? We were so busy building brand new school systems, ringing the old city with new beautiful buildings. Everybody was satisfied that everything was well and good in the city. The old leadership was absent and the new leadership was not yet developed. We forgot about the physical as well as the program aspects of the city schools.

During the entire decade of the '40's in the city of Cleveland total capital improvements amounted to $1,980,000. This summer in a twelve week period we spent $12,000,000. No wonder we still have children in schools that are 113 years old built before Abe Lincoln moved into the White House the first time. We have schools that were built before Edison invented the electric light bulb. We have buildings that were built before Bell invented the telephone. We have a backlog so great that it is almost impossible to comprehend. If we just brought the Cleveland schools physically up to 50 years of age, it would cost us $300,000,000. If we brought it up to the standard of the suburb I left, it would cost one-half billion dollars. Nobody paid attention to this problem.

The Chamber of Commerce published full-page ads against school bond issues and levies. Great prestigious citizens who were elected to the school board proclaimed with dignity and with sanctity the "pay-as-you-go" program. The only thing was we weren't paying and we weren't going. All right, let's not dwell too long on any one part of the profile.

What happened to the people? Since 1950 in the city of Cleveland, the number of children coming from relief families has increased by 700 per cent. Today one-fifth of our total enrollment are from homes that are getting one kind of public assistance or another. We have seven per cent of the total enrollment of the State of Ohio and thirty-three per cent of the relief children of the State of Ohio. Do you suppose you can tell those facts to the legislators? Do you suppose they take that into consideration when they make out the foundation program that puts Cleveland at the bottom. This is true in every state. Big urban centers are at the bottom as far as per capita contributions of the State Legislature.

What about the educational problems of the city? This is a city where 50,000 adults are on the records as being functionally illiterate. This is a city where our total adult population, above 21 years of age, 45 per cent have not gone beyond the eighth grade.

If you take a picutre of the relief roles we are heavy as far as children from relief families are concerned. Some of our schools have over 80 per cent of the children from relief homes. Take a further look at the relief roles. It wasn't too long ago that we were spending $21 million a year for relief; then $25 million, and $50 million; this year, $60 million. This year we will spend more money on relief in the city of Cleveland than we will on the total educational program for all elementary school children. When we look at New York City we feel better because this year in New York City they will spend more on relief than on the total educational program of elementary and secondary schools. We could go on and on.

We find almost a total absence of reading materials or reading, almost a total absence of strong cultural inputs in the area of good literature, good art, good music. Add to that a physical deterioration of the neighborhood and you have an ugly environment that spells trouble. Now, at this point I would like to say that I am not pessimistic about Cleveland or education in Cleveland. This may be another reason why I ought to see a phychiatrist. I was at a psychiatrist's home the other night. I was visiting socially, not professionally. He is a great guy after three martinis, and he had had five. He talked about the ego of mankind. He said, "It was great back in the good old days when we believed that God created us but then so many things have happened to our ego. Some crazy scientist came along and decided that we weren't the center of the universe, but we lived on a little earth. That hurt our ego.

"Then those crazy scientists came back again and shot another great big hole in mankind. They said God didn't create you; you came from monkeys. Think what that did to the ego of man who thought he was something special that God had created. But do you know what is happening to us today?" We are being restored.

We sent a couple of guys to the moon and they started walking and you know they didn't see any footprints and they didn't see anybody. We got some spooky equipment up on Mars. And there is nobody on Mars.

We are getting ready to send some more equipment beyond this sphere and you know we are going to find there is nobody out there either.

"We are all alone, we're God."

Well something has happened to the ego of kids that come through a system of total isolation, total poverty, total squalor, and total absence of the fine cultural inputs that should be put into the early lives of children.

What is the role of the school in all of this? I tell you today the role of the school is more than teaching reading, writing, arithmetic. And anybody that thinks the role of the school today is teaching reading is absolutely out of his cotton picking head. It's not that.

The kids that are not learning to read are not learning because they don't have good teachers or the system of reading is rotten. They are not learning to read because their way of life has not yet become relevant to the point that they need to read and reading is important.

I don't speak German; my mother did, but I don't. Why? Because I have no reason to speak or read German, none whatsoever. I never have had a reason; but let me tell you if I found it necessary to read German to make a living or to communicate with my neighbors I would be doing it in a few weeks because it would be relevant.

Reading isn't relevant to too many children in the inner-city. It is time we stopped beating the reading teacher. We can take the reading teacher who does the best job in the United States, reduce her load by one-half, and put her with a group of children that don't know reading as a way of life and the kids will cheat. There will be very little relationship between the quality of the instruction and the amount of achievement.

But I tell you what will improve reading. When we in public education with the support of a total society begin attacking the problems that I have just identified here, when the public school as the one common agency begins to be the organization that attacks problems of unemployment and isolation and cultural deprivation and does it effectively, everything else is going to start fitting into place. The time has come when society should pull itself together. Those who think that their position is that of needling and criticizing and tearing down should be given less attention and less financial support. If the few people with talent in those groups could be persuaded to help make the system work, then we would start seeing things moving. I would like to see some thrust on the part of the legal profession in the direction of helping to change and improve society rather than stand by thinking it's smart to criticize every single thing that a group of people in education are trying to do for children.

I am encouraged this afternoon because I am beginning to see evidence of change. I am beginning to see evidence of change in the pattern of crowding in the inner-city, in the areas of Hough, and Glenville. I find that the enrollments in elementary schools in the last four years have dropped by twenty and twenty-five per cent. The horrible push forward that we have had for twenty years in enrollment has not only leveled off, but has dropped in one location by twenty per cent and in another by twenty-five per cent.

I am encouraged from the standpoint of employability and actual employment. I see some success stories on the horizons when we take our high schools and make them into schools that have two exit doors, one leading to college and the other to immediate employment. I see in Cleveland our business and industrial community opening its doors to inner-city employment. A year ago over ninety per cent of our graduates from the five inner-city high schools were employed; the same thing was true again this year.

This year's graduates from the five inner-city high schools will take back into the inner-city for the first year of employment better than $5 million from payrolls; not relief money, but payroll money. This is green power. If we get just five years of this trend with an additional $5 million of new money going into the inner-city each year, some changes are going to take place.

When I take a look at what happened during the last five years as far as admissions to college, I find that there has been an increase of over one hundred per cent of students from our inner-city high schools actually enrolling in college.

Take a look at what happened to the amount of scholarship money available. Five years ago it was less than one half million dollars; this year, three and a quarter million dollars; next year it will reach $4 million.

Then look at what is happening to little children as far as books that they are taking home. Five years ago we didn't have any libraries in the elementary schools of Cleveland. Today we have libraries in every one of them. Just last year three and a quarter million books went home with little children. Don't tell me they are not reading now. This year our aim is 5,000,000 or more.

Take a look at what's happening to our older buildings. In five years we have opened eight hundred new classrooms, enough to take care of double the enrollment of Shaker Heights. We will open that many more in the next five years.

Today we have one thousand more teachers and professionals than we had five years ago. Five years ago we had a shortage of four hundred teachers. This year we interviewed ten thousand young people, hired twelve hundred, and could have hired three thousand. Part of this success is due to the kind of salaries we get negotiated with the Union. And Jim O'Meara started to negotiate for better salaries right here at the table now.

I see some progress when I look at the way people are beginning to react. Don't listen to the loud voices because they are in a minority; the biggest voice represents the smallest following. The people with the answers don't have the problems. If we listen to what the small people are saying and listen to the small voices, we find almost a total unanimous approval of doing something for our cities and for the children of the cities. In six years of service at the city of Cleveland the tax rate for school purposes has gone up one hundred per cent by a vote of the people. Now this tells you that people want change; they want quality education. I think what we have got to do is aggressively attack the targets of tomorrow in our cities. We have got to ask ourselves which targets can education successfully attack; what are the new alliances we have got to have as we attack the problems. I predict that the cities of this country can get themselves out of trouble; that we can have some success stories in America; that we can produce a better society; that we can avoid, if we want to, the polarization that is now beginning to occur. I am telling you today it cannot be done if we listen to the voices of attack, if we listen to the voices of destruction. It cannot be done by closing our schools, by decreasing our expenditures for education, or by attempting to use the school simply to promote one person's or one organization's viewpoint.

Now we have great problems, but none of the problems are so great that they cannot be solved. Man usually has had his greatest hours during his periods of greatest crisis. The crisis of our urban cities were never so severe as it is today. The crisis calls

for a new kind of coalition of higher education with elementary and secondary education. We need the help of the scholars; we need the help of the professions; we need the time of the housewife; we need the understanding and open door of business and industry; and we need the kind of support that can come from interested, concerned citizens. Education needs the support of a total society and, if it can get this, I think we can pull ourselves out of trouble.

This is how one city superintendent maintains at least a little degree of sanity and the ability to go home at night and sleep and get ready to come back tomorrow to face the problems because I am now seeing evidence that a total city wants what is good, what is in the right direction and that there is chance of success.

CONSTITUTIONAL PROTECTION OF PROTEST

by

William Van Alstyne
Professor of Law, Duke University

The burden of my opening remarks is rather light and simultaneously inadequate for reasons observed in a quotation from Oliver Wendell Holmes, Jr., that "general propositions do not decide concrete cases." General remarks by a speaker tend not to be responsive to the specific concerns of members of the audience. But recognizing that is so, I merely propose therefore, in these introductory remarks, to try to state certain general propositions now sufficiently developed by the federal courts that we can understand at least the ground rules against which we may then test more particular situations. Then to the extent that you may be disappointed in the seeming generality of my opening remarks, I would count on the panelists on your own initiative to raise specific issues to which I would try to respond with more appropriate directness than is possible in the presentation of an overview.

I want therefore, briefly to try to touch upon roughly four different considerations. The first of these has to do with the general extent to which freedom of speech as explicitly protected in the first amendment to the Constitution is carried over and made applicable to public schools through the due process clause of the fourteenth amendment, that clause which provides that "no state shall deprive any person of liberty without due process." Secondly I want to reach the extent to which the requirement of more regular procedure or the right to a hearing, may now be newly infused as a requirement, a prerequisite to disciplinary action which may be contemplated against any student alleged to have violated a valid rule. Then even more briefly, I want to touch on some other items. One has to do with the special problem of mass misconduct. That is to say alleged disciplinary problems involving so large a number of people under such calamitous or seemingly emergency circumstances that new elements are introduced that may make it appropriate to consider some things which a school would not be free to do otherwise, as using summary process or peremptory process which would not be constitutionally tolerable if we were dealing with more sedate times and merely an occasional infraction by an individual student. Finally because much of my own background in this area is drawn from litigation at the university level, I want ultimately to acknowledge some tentative distinction may still endure, and thus make feasible a degree of control at the high school level and surely at the primary school level which would be felt constitutionally intolerable in the context of the public university situation where one is dealing with more mature students and dealing with an institution which has a more specialized academic function and therefore correspondingly less of a general *in loco parentis* function.

With respect to the first item, I mean to suggest that the trend of federal decisions and the evolution of constitutional law describes, in regard to the freedom of expression on campus (even embracing symbolic conduct such as wearing of badges or the distribution of leaflets or other varieties of political communication), roughly three kinds of restrictions of the prerogatives of the public school's authority and they are these. First, the requirement acting only on the basis of rules as distinct from acting upon a claim of inherent authority alone. The notion I am trying to suggest is that to the extent that students are to be subject to severe sanctions for political activity, the action sought to be brought against them in a given context must be taken primarily on the basis of previously published standards. The school board must undertake to review the situation to establish the areas of proscribed and prescribed conduct. The courts have become reluctant to accent claims of inherent authority where a given school official does not act pursuant to a preordained rule that has been fashioned by a Board of Education, but where the school official composes the rule on the spot suitable for the occasion, which he felt retrospectively was somehow disruptive or distasteful. The notion of *ad hoc* rule-making, where the rule is more or less conjured by the man who then presumes to impose his authority against the student, carries with it a trace of a very old vice: the vice of ex post facto law, the invention of a norm which is established only after the conduct sought to be punished has already occurred, whereas the conduct had to take place at a point in time where the individual engaging in it had no particular reason to know one way or another whether that which he proposed to do would necessarily be regarded as forbidden. Another part of the constitution itself condemns the use of ex post facto laws as a general criminal mechanism in organized society. It cannot come as a great shock, therefore, that the courts may also require a greater degree of rule-making circumspectness on the part of Boards of Education. They should act in advance to describe with reasonable clarity and specificity those norms of conduct which they expect their students to observe or those fields of endeavor which they expect their students to avoid. The absence of such a rule would necessarily make any subsequent disciplinary action reasonably vulnerable to being set aside by judicial decision. But that is an easy first step, although I would suppose as one tries to think about putting together a so-called campus code or a school board code it then becomes mechanically a very difficult and trying subject. And I do not mean to suggest that the Board of Education is under any obligation at all equivalent to that exercised by a legislature to the extent that it would have a detailed handbook resembling a whole collection or codification of state statutes, but that at least the zones of prescribed conduct be described with sufficient clarity, that no one can subsequently claim that he was innocently misled in supposing that that which he proposed to do be regarded as condoned or innocent by the institution which subsequently sought to take action against him. There is a necessary compromise between the need to know and the feasibility to provide that notice.

As one moves then to the second level of political action and tries to consider the constraints of what it is that the school may not forbid the students to do, I think one may best address the subject in terms of two very conventional legal formulations. Where the area of activity has to do with political expression at least (and I do not want to generalize beyond the specific subject of political expression), the usual constitutional formulation runs something like this: "That a state and therefore its boards of education may curtail political expression only to the extent that it is prepared to show that the use of the expression, under the particular circumstances, would create a clear and present danger of a substantive evil which the state is entitled to avoid." Most people readily understand the first part of the test–that which requires that the danger be clear and present–that one not try to forbid for instance, the use of political activity on campus, the distribution of leaflets, the holding of assemblies in spaces which are physically suitable for holding of assemblies, that they not attempt to justify a condemnation or prohibition of political activity, merely according to some *remote speculations* that at some later time, if not curtailed at some level, it *might* escalate into a major act of disruption. I think the words themselves are plain and sensible enough with the requirement that alleged danger be "clear" by a high probability and "present", reasonably imminent, as a condition of punishing the conduct. The difficulty, the principal misunderstanding, has come from inattention to the second part of this formulation. A clear and present danger of a substantive evil which the state is entitled to avoid immediately raises then the more difficult question because something must be assumed. What sort of things is the state *not* entitled to avoid? What kind of standards is the school not privileged to have at all, irrespective of the clarity and immediacy of the "danger"? The basic limitation is an ideological limitation, that is to say this, that the evil may never be described in terms merely of ideology–that a school board no more than a state legislature may seek to suppress a point of view solely because of misgiving or anxieties or apprehensions or antagonism to the subject matter or idea which is thus presented. To take a specific illustration, for instance, (and an easy one, and indeed and I would hope in this company it would be a frankly uncontroversial one): even if an overwhelming majority of parents and all the members of the school board were so persuaded that it would be educationally disastrous for young students at the high school level to be exposed to those who are hostile to current foreign policy or the military committment in Vietnam, that they would seek to avoid what they think of as educationally damaging or ideologically damaging to the student by forbidding them to listen to speakers or to receive literature or to hand out leaflets intensely critical of that foreign policy. That is not the kind of evil which the state is entitled to avoid. The Constitution itself has withdrawn from the state the power to control the nature of the ideas which are allowed free competition for popular approbation to determine that which will ultimately prevail, in the market place of ideas. To put it differently, and again to take the thought from Mr. Justice Holmes: the best test of truth is the power of a given thought to get itself accepted in the competition of the market, and *that* truth is the only basis upon which our wishes may safely be carried out. The emphasis of his statement is on the adjective "that", rather than on the word "truth", that is to say that in a democratic society, whatever can command popular support after freely competing for that popular support without inhibitions or censorship from those who have misgivings about the nature or essential vice or evil of the idea, is entitled to have its chance. Its triumph in the competitive market place is the democratic acid test as to whether or not it was the better idea. But one can go on, he need not take something as easy to digest as freedom of dissent on American foreign policies. One may speak even of freedom of dissent with the regard to the use of certain drugs so long as the presentation is confined to communication that remains in the realm of ideas as distinct from inciting a violation of the law, it may not constitutionally be described as a substantive evil, the acceptance of which can be sought to be avoided by censoring those who hold it. In short the school board, like the state itself, must not punish the peaceful expression of an idea sought to be received by those willing to entertain it. The corollary observation drawn from constitutional law is this, that notwithstanding the protection of free speech, rules which can be described merely as restricting opportunities or expression to a reasonable time and reasonable places and to be conducted in a reasonable manner will generally be sustained as a matter of constitutional law. Again to take a very easy illustration: school board rule which would place off bounds the particular location of the principal's office would be sustained by the court on the basis that the peremptory use of that office even for purposes of student political communication is so fundamentally incompatible with its primary use as a place where the principal must ordinarily work, that without infringing speech on an ideological basis, one may fully withdraw that location from use as a political forum. I begin by taking this absurd and easy illustration, however, recognizing that one works on a spectrum, that as you go to other compartments within the campus itself you may arrive at a different conclusion. Even the corridors, for instance, of an academic building may not be deemed unreasonable places for all forms of political communications if the *particular* mode of communication is not otherwise disruptive or frankly incompatible with the customary use of those corridors. Thus, for instance, an attempt to distribute a given leaflet by a single individual who does not congest the traffic flow in the corridor may be protected. On the other hand, attempts to stage an assembly or a congestion of numbers of people in the corridor may itself be regarded as such as unreasonable manner of political communication or so inappropriate, given the time when it is proposed, that a neutral campus rule that tries to preserve order and tries simply to preserve aspects of the various facilities for their customary use is certainly tolerable as a trade-off against its marginal incursion on freedom of speech. Thus the two principle limitations are a clear and present danger of an avoidable substantive evil and rules which are limited to the neutral control of political communication according to reasonable time, place, and manner. I should hope to get more specific with you, perhaps as we work into other illustrations. I hope it is clear from what I have said that since ideas may be communicated other than by written or spoken means, these observations necessarily are meant to apply to so-called "symbolic" conduct, whether it has to do with wearing of badges or other techniques of communication not involving the conventional modes of oral or written expression.

Assuming that the rules themselves may be valid, and that there are indeed rules to speak of, and that a given student is felt to have violated that rule, we necessarily reach the next phase of this disucssion, which is, "What is the extent to which a student is entitled to a trial-like hearing, or indeed to any hearing at all before a decision of discipline is made?" In answering that overall question one has to make several distinctions. The first one is this: that the quality of procedural due process is not a single, frozen, stylized thing. There is no one way of describing what is required as a matter of constitutional law before sanctions are imposed by various state instrumentalities upon one person. The quality of procedural due process varies as a legal requirement most especially according to the gravity of the sanction and the extent of jeopardy in which the individual is put. To take an easy illustration, so that we can get away from the notion that there is something built into the law that imposes on every school board or every court a single model that is absolutely rigid (with hearsay rules and court stenographers and jury trials and all the rest), consider these two cases: on the one hand, the most severe sanction that we know–death–a capital penalty case, in a criminal court and on the other hand a sanction that can't amount to more than oral reprimand or a mere counseling by a school official. Before a man can be sentenced to death in a criminal court, the state must proceed not only under clear and valid statutes but he must be charged formally and an indictment returned by a grand jury. He is entitled to be represented by counsel. He is entitled to be tried by a jury of his peers, the right of confrontation is applied, an endless stream of indiscreet procedural requirements are all built in, climaxed of course by the high burden of proof which the state must carry; the man is not to be convicted unless his guilt has been established beyond a reasonable doubt. To take the other extreme, in the school setting where the *only* sanction in jeopardy of which a student may stand is the prospect of an oral reprimand or even social probation for a semester, or reference to a counselor whom he must see, the immediate consequences to his ultimate career, to his employment options, to his future educational opportunity are so diminished, so absurdly lighter in comparison, that that form of discipline, if it deserves to be discipline at all, can necessarily be pursued with completely relaxed informality. None of the high procedural safeguards, which would necessarily apply in the criminal case, need be observed in this case. When, however, to speak specifically of the more conventional form of discipline in today's school problems, where the sanction is at least as grave as *suspension* for the balance of the academic year or outright *expulsion* and it cannot be regarded as counseling or merely transfer to another school of at least equal quality and of equal convenience to the student, where we're talking about sanctions that may significantly impair the future earning capacity of the young man and his future educational career as well, then an intermediate degree of procedural due process tends to lock in. All of this is rationalized, that is, made rational, made reasonable, merely by observing that the greater the potential consequences from making a mistake the greater society has resolved to use care in the determination of that particular decision. When you get down to the specifics then of the more severe sanctions as applied to school children at least at the high school level it is my impression that they include, or they probably, according to the trend to judicial decision, include these things. First, a clearly stated charge—a clear statement of what the rule is that the student is alleged to have violated and what act he is thought to have committed which make it appropriate to impose some serious sanction upon him. The requirement of this degree of specifying a charge is there in order to advise the student of what he has to prepare against, what he is thought to have done so as to make useful the next level of the requirement itself, namely the hearing, and that one knows reasonably well in advance what he is thought to have done. Otherwise, the hearing itself may become a matter of surprise, an empty gesture when one learns for the first time, too late to try to get other people together to act as witnesses or uncloud their memories and make the hearing useful. Thus the elementary requirement of the charge. It need not even be in writing but simply an intelligible communication what the student is thought to have done wrong, proposed to him sufficiently in advance that he will then have a decent opportunity to utilize whatever resources he has in preparing for a hearing which may follow. There must be a hearing. It need not be a formal or ceremonial thing but it must at least provide him with an opportunity to appear, generally to be present while those who are presenting things against him state their position, to enable him to know how to answer if indeed he has anything to say, but essentially to make certain that the person or group who is making the decision governing his future, will make it on the basis of information what he has been able to share and which he knows, therefore, the administrator may act upon. So one may speak informally of a right to know the nature of the evidence presented to the man or group who is thinking of making the critical decision against him. There is probably a requirement of impartiality in the group or individual who makes the decision and I speak specifically of the right of "impartiality" and not a right to judgment by other students. For my best forecast, that is all the court is likely to require—a degree of detachment, of uninvolvement in the body or individual who is making the critical judgment.

An issue that has been in controversy with many educators and some courts, and which remains a subject of disagreement with the courts on this issue of due process is the extent, if any, to which a student is entitled to be accompanied by an advisor of his own choosing up to and including an attorney at law. There is currently disagreement in this area. The majority of cases thus far have rejected the notion that the student has a right to have an attorney present. Yet two or three cases quite recently have gone the other way. And taking into account the relative novelty with which this whole field is being explored, I think it a reasonable forecast that attorneys at law will probably be allowed access at least to those hearings in which the consequences to the individual students may be very grave, although at the same time, I believe that the attorney may have to play a reduced function; that is to say, he may act as an advisor, he may advise his client, but he will not necessarily be given the prerogative as against a group of laymen who preside on the board to engage in the customary adversary role that an attorney at law may pursue in a court which is equipped to cope with that degree of professional skill. But the presence of professional counsel at least for the sake of advising the boy and his parents is at least a possible development in my view. Finally, although this is not a constitutional requirement, a hearing which places the student's academic career in jeopardy should, I believe, have a verbatim transcript; and that does not mean a court stenographer, it does not mean again any elaborate and costly mechanism exactly taken from courts of law, it merely means for instance, a tape recording of the entire proceedings, for future use if and when this controversy finds its way into a court. And I intend this this last suggestion in a kindly spirit, because to the extent that school boards can persuade a court of law that the nature of the hearing itself was fundamentally fair, then the court is very unlikely to intervene and made an independent review of the whole transaction over again. Indeed the customary measure of judicial review, for instance, over a subordinate administrative group is merely to look at the record, if it is drawn into controversy, to determine whether or not there is substantial evidence in that record, considered as a whole, to support the conclusion reached by the administrative group. Thus it seems to me that there is economic feasibility in the use of a tape recording which may never need to be used, and after an interval of time, of course, may be reused for some other occasion; protective of the student, and for the school, extremely useful itself. This then in rough fashion can be seen as a not inaccurate overview of the substantive and procedural limitation in regulating political controversy on campus.

That leaves for observation two minor themes. One has to do with the emerging tendency in some areas of the country for mass protest, mass misconduct, which requires some flexibility in coping with the situation. For to be sure, if one is dealing, for instance, with a brawling group of 2,200 students, who seize a building, and nothing may be done to anyone until the full procedural apparatus has been observed in respect to each student, we may be forever in trying to restore order to the campus. I do mean to suggest therefore, that the federal courts are not insensitive to the emergency need to reestablish order and, to the extent that interim measures can be seen as justified by the proportion of the emergency, they will be sustained. Let me be specific in two regards at least. One has to do with the use of an interim suspension on the spot, prior to a hearing on any underlying charge. If we assume, for instance, that a number of students are blocking the hallway or otherwise directly interfering with the conduct of classes, and that there is no feasibility to hold individual hearings of the style I have tried to outline and still restore order in a sufficiently prompt fashion to get on with the ordinary school routine, given a reasonable effort to identify the individual students, an interim suspension against those identified students may be imposed and take effect pending the subsequent outcome of the sort of hearing I have tried to describe. There is one qualification to the use of interim suspension that at least one federal court has suggested, however, and that is this. That to the extent that the short circuiting of fair hearing to determine individualized guilt is justified in the first instance because of the emergency, because of the felt necessity to take this measure in that the continuing presence of the student until the hearing is held is itself felt to be a danger to the school, unless the hearing is held within a reasonable amount of time, the student must be given an opportunity to provide personal reassurance pending the outcome of a more regular hearing that will not continue to be a source of disruption to the school. What it reduces down to mechanically, I suppose, is to clear a given area and persuade the students on the spot, but if there is to be no hearing to determine their individual responsibility within a few days (it sometimes may be simply impossible as a physical matter) then those students must be at least given the chance to come in and indicate that if they are restored to the classroom, pending the outcome of the hearing on their major offense, they would provide assurance that they would attend class and not engage in disruption pending the outcome of the hearing. Thus the trade off between the protection of the student against peremptory process by the school and the maintenance of order. (As an additional measure that the school is entitled to use under these circumstances, recourse may be had to a local court to secure an injunction against the continuation of certain boisterous or immediately disruptive conduct by the students.)

Finally this observation, by way of scaling down and trying to put in more modest perspective the necessary relevance of what little I have had to say. As I tried to indicate in the beginning, most of the legal development in the federal courts based on constitutional law has arisen not in the setting of the public schools, but in the setting of the public universities. And it is true, to be sure, that the Fourteenth Amendment applies equally to public schools as it does to public universities. Yet it does not necessarily follow that the particular protection which a person receives is the same irrespective of his age or the nature of the school. There *are* differences between high school needs and university needs which will be still acknowledged by the courts. Thus, for instance, a public school may have some rules respecting social conduct which a court might not believe were constitutionally tolerable with regard to an adult age person 21, even 18 in a university. In the relative younger age of the high school and certainly the primary school students, the notion that the school acts *in loco parentis* cannot be wholly disparaged.

UPSURGE AND UPHEAVAL IN SCHOOL LAW

RESPONSE TO WILLIAM VAN ALSTYNE

by

William Hartman, Attorney
Cleveland, Ohio

In this situation I like to return to my freshman year at law school and get out some of my worn books. I have turned this time to Blackstone which I find very comforting on this subject. It says a parent may delegate part of his parental authority during his life to the tutor or school master of his child who stands in *loco parentis* and has such a portion of the powers of the parent committed to his charge, that of restraint and correction, as may be necessary to assure the purposes for which he is employed. Now at the time I was in law school that was a very comforting thought because that solved the whole situation. Here, however, on reflection, if the schools today were only delegated the authority that the parents now have I think we would have utter chaos.

Now I am going to spend a little time, very little time, talking to you from the standpoint of the lawyer that gets called by the school board or gets called by Mr. Sheldon. What do we do? The first thing, and before I even consider constitutional rights, and I think this is going to become more and more important, the first question I try to ask myself is what power or authority does the superintendent or the board have to impose and enforce a rule. Forgetting the constitutional question entirely, where do they get this authority on this particular rule? I also try to keep in mind that school is not a public forum, it is not in the category of streets and parks, speech is not free in all places at all times in every manner and I try not to become confused with some of the cases that have to do with the efforts to stop speech making in public places, public parks and public streets. I also have come to recognize that you cannot rely upon the failure to show an abuse of discretion. What a comforting defense that used to be when you could simply rest and argue that no one has shown an abuse of discretion. That will no longer do.

PANEL RESPONSE

When we get to the making of rules I am concerned greatly about whether the rule is going to be enforced in a situation which really it wasn't intended to cover, but by its language it does cover. In other words, whether or not the rule is going to be uniformly enforced and whether to enforce it even in a situation which really doesn't bother you, the school may end up in having the rule become invalid because of lack of uniform enforcement.

I try to urge whoever calls me to avoid censorship. Just using the word is a horrible thing, but so often you hear the question, "Isn't it all right if I read the particular thing that they want to distribute and if it sounds all right to me maybe I'll even put it on the bulletin board." That of course is a rule that just won't work.

I think all of us in this field have to recognize that many of these situations are deliberately created. It is not in all situations a case of seeing to it that the students' constitutional rights are protected, but rather it is a student who with prior advice from an attorney, and with instructions to return to the attorney as soon as a decision is made to create a confrontation. He knows what he is demanding to do, he will probably educate the principal or whoever faces him in his constitutional rights and go straight to the law office of his counselor as soon as he gets the answer and in that situation it gets pretty close to a losing case for the school board because it is well planned.

I also feel that one place that we are in trouble here is that the penalty for this sort of thing is so severe. There doesn't seem to be much that you can do between expulsion or suspension except slapping of a wrist. You are either going to stop the activity or you are going to permit it. Now I would like to read to you a portion of the District Court's opinion in the Guzick case because I think it well sets forth the court's feeling in this particular situation, covers the situation well, and is self explanatory. This case is now on appeal and will be argued in the Sixth Circuit on the twelfth of December. This was the situation and the facts will become obvious as I read it.

> The court has concluded that Shaw High has had a long standing and consistently applied rule prohibiting the wearing of buttons and other insignia on school grounds during school hours unless they are related to school sponsored activities. The court finds that this rule has been of a significant factor in preserving peace and good order in the school and preventing provocations, distraction and disruptive conduct. The court finds that if this policy of excluding bottons and other insignia is not retained some students will attempt to wear provocative or inciting buttons and other emblems. If these provocative buttons and insignias are permitted to be worn they will further amplify an already serious discipline problem. The court finds that if students are permitted to wear some buttons but not others, similar disruptions of the process will occur. Many students will not understand the justification for any rule that prohibits the wearing of certain buttons while permitting others. Any rule which attempts to permit wearing of some buttons but not others will be impossible to administer. It would make the determination of permissible vs. impermissible difficult, if not impossible. It would be disruptive, many of the buttons which are most sought to be worn are of the provocative and inciting type. If a line is drawn between provocative and non-provocative buttons, the student most desiring to wear buttons of a provocative type will feel discriminated against.

It goes on for several pages, but I have read enough to make my point and it is this: that in this situation if you are going to have a confrontation in a sense that you say this is our rule, we are going to enforce it, you are certainly going to face action in court and you cannot overprepare your case. You can well imagine the amount of evidence, I think this was in trial for four or five days, that went to support just those few statements or conclusions of fact.

In the final analysis, if you have a rule, and if you are going to enforce it, you have taken on a terrific burden and you are going to have to get to your counsel before you start drawing and enforcing the rules.

VAN ALSTYNE'S REACTION TO HARTMAN

Far be it from me to suggest that the school board ought not to give substantial business to the legal profession. There really is just the last item that Mr. Hartman brought up that I might provide some clarification on.

I have read that particular case and it is a marvelously well prepared case. I do not want to make clear that one ought not be systematically misled by the results in a particular case. The Supreme Court had before it, as Mr. Hartman of course knows, just about a year ago, a case which superficially is fairly similar involving the wearing of black strips of cloth in the form of an arm band in the public high school in an Iowa school. The children wore the arm band as a mute or symbolic protest over American involvement in Vietnam. They were suspended until such time as they would elect to return to the school not wearing the emblem of political communication. The District Court refused them relief, the Court of Appeals divided evenly, the Supreme Court reversed. I think it was nearly unanimous though not quite unanimous.

I have put in the illustration, really I suppose merely to add to your distress that you cannot therefore even take from this particular session even a seemingly trivial piece of reliable information that a school board can at least take a firm stand on the one issue of peaceful, though symbolic communication on the school premises. It would be a mistake to suppose, however, and to overread this particular case or anything else we might discuss.

It would be a fatal error to suppose that school grounds are so distinguished from parks and streets that they can be completely screened off as places for political communication. The case I just referred to is *Tinker*, which is itself the very best evidence of that.

A related case from the Fifth Circuit, *Myers vs. Burnside*, had to do with Negro children who wore lapel buttons to school and did not themselves otherwise throttle students or intimidate them or push their views upon unwilling lookers, unwilling auditors. They too were suspended. Their suspension was also reversed in the Federal Courts. In short, there is judicial recognition that although distinctions may be made within a campus according to reason, time, place and manner, the State cannot simply cordon off the geography of school property as such and place it beyond the sphere of any kind of idological communication at all. It is therefore a function of time, place and manner.

The facts in this particular case, if one was listening, indicated that it was a long standing rule, it was a racially integrated school with a long history of considerable violence. It had a long history in trying to administer rules dealing with particular buttons, the judge felt on balance that the rule was applied under the circumstances was itself reasonable. I had misgivings and want to conclude with one observation.

Something makes me uneasy about the judge's conclusion. This is not entirely fair for there are other elements contributing to the results in the case, but one of the contributing elements if you were listening was this. Since the reaction of those who may see the button may be hostile reaction, since it is the reaction of the man who is offended by what is carried on the button and he may threaten violence, therefore, is it just for the school to forbid the wearing of the button? Now the button in question in this particular case was not in my judgment a provocative button, it was simply a button that said, "Vietnam Moratorium Committee," a certain date, that was all. The point I want to make is this. That in terms of the tests we have been discussing, are buttons a clear and present danger of an avoidable substance of evil. Of course we are of one mind that physical violence is the sort of evil which school boards, as well as state legislatures may seek to avoid by punishing physical conduct which constitutes violence, but if you were careful about this you will note that the immediate threat of violence is not by the person who wears the button, which is otherwise in unoffending language, it is not obscene language, it does not use certain trigger words which are emotively, immediately provocative to the other person. It is rather the substance of the message which is found to be offensive and which generates violence in the person who sees the message. It generates a feeling of hostility that may then give rise to a minor disturbance as such.

There is a perfectly well understood doctrine in constitutional law, however, that freedom of speech may not be denied to a person who is otherwise attempting to communicate in a civilized and peaceful manner, merely because of apprehension of the violence threatened by those who are opposed to what he proposes to say. We have had at least one acid Supreme Court test under genuine circumstances of reactive violence, not violence on the part of the person who wears the button, but the threat of violence by those who were hostile to what he seeks to do. The case was this, and I suggest that there is in fact a very powerful parallel to this kind of situation that ought to make one fairly modest in the formulation of rules: Little Rock, Arkansas, in 1957, where Central High School finally was desegregated by power of a Federal Court order. Yielding to the Court order, the School Board took conscientious and appropriate steps to secure the admission of Negro students otherwise within the attendance zone as described by the Court. The Board acted in complete good faith. Nonetheless, the parents of the white children were so outraged by the prospect that Negroes would attend school with their children that they began to ring the high school and to threaten the lives and the welfare and the property of the school board members and there was literally a ring about the school. To a certain extent the inflamation was aggravated by demagogic statements of the governor of Arkansas.

Faced then with this immediate potential, and a very serious potential of broad scale violence, the school board went back into the Federal Court and asked for a postponement for the effective date of its desegregation order. Their argument not being that they were seeking any longer to segregate the school but that as a necessary precaution to avoid violence on the part of the reactive party they should have the postponement. That case went to the United States Supreme Court and the United States Supreme Court in the very well known case, *Cooper vs. Aaron* of 1958, gave the School Board no additional time whatsoever. Their observation was simply this, that the exercised constitutional rights cannot be made to yield to the threats of force and violence to those who oppose their exercise and at the time that was not theatrical rhetoric for it required a presidential order, the mobilization of the National Guard and the use of military force to secure the admission of those students against the threats of violence of those who opposed this exercise.

Now I suggest that there is more than accrued analogy to the right of free speech. With violence threatened by those opposed to the idea, for instance, cannot serve as a justification to punish the man who merely seeks to speak. The appropriate remedy in this case is to apply all essential sanctions against those whose own conduct is the immediate source of the threat of violence and not for the man who peacefully seeks to communicate an idea of his own.

RESPONSE TO VAN ALSTYNE

by

Farley Seldon

Principal, John Hay High School, Cleveland

A young teacher ran in, just before I was ready to leave, to indicate that someone had pulled a knife on her in the hall. This is always a problem. Can we search them? If so, what part of this can you use as evidence? If he has marijuana in the building, and you know it, can you search him? If he has a pistol on his person or in his locker, and you are aware of it, can you go to his locker without his permission and take it from his locker?–even though you know that he might be one that might readily use it.

I am learning every day about student protest. I could have brought a few young people here who could have really told us something about protest. I don't know it, I tell them everyday that I am simply trying to learn. I think many of them do, and I think that many of them are aware of the constitutional guarantees that they have, and they readily point this out to us.

I had a youngster just the other day, and I thought of this as the speaker was mentioning the need for Boards of Education to have in writing those things which will help us to make sure that we can legally do things in a building without confrontation. This young fellow came in a few days ago, and he is one of the students who last year was one of the leaders in closing down the school for over a week. As you know today students feel that whatever affects one affects them all. There was a young lady that we had to transfer to another school because of a physical condition. He came into my office and said, "Mr. Seldon, (I knew exactly what he would ask first, because he is a pretty smart youngster), I noticed that you told her that she had to be transferred to another school." I said, "Yes, that is true." He said, "I want you to show me in writing because she is married she can't attend the school any longer." It so happened that he thought he had me in that case, but he didn't. I simply got the principals' manual out and I said, "Sure I will show it to you." I opened the book and showed it to him. At least he saw it in writing. It would have been different if I had told him this is a rule of the Board of Education, but I can't produce it for you in writing. So at least he knew that we were going with something in writing, and we had not made a rule to fit that particular case. I think this is essential, we must have in our schools, in writing, things that will cover many of these situations.

As I listen, I wonder how we can cover some of the situations that we are faced with in terms of protest. They come in so many different forms. You really have no way of knowing in what form it may come tomorrow. It is really rather difficult for you to spell out some of these things, but I think that it is definitely true that as many of these rules as we can spell out in terms of student conduct and expected behavior, we should have in writing.

The students of today are very much aware of their constitutional rights and they make us aware of that. Now I feel, however, one thing that is coming out of student protest (in secondary schools especially) is that we are now finding out we have to do the things that are legal. We can't just make a rule because we have a problem, we have to make sure that we have some real legal backing for the actions that we take. I think this is good, truthfully. I think that for a long period of time many parents did not involve themselves and therefore we were able to get by with things that were not necessarily legal. Today this is not true. I wondered just how you could have a hearing with disruptions, where there is very little order, and where they are taking over the halls and classrooms. How would you set up the mechanics to get them back. I don't know how you could generalize in such a way as to provide things in writing that would cover many situations that would face one in student protest action. I think that it is good that we should make sure the pupils understand exactly what the charges are that are made against them.

I don't think that we would be too effective if we have to bring those people who accuse the students to face them. I think that all of us are aware of the fact that many of them are afraid to face the person that they have seen break into a locker, or come in with a weapon. So consequently you have to wait and say okay, you can face it, you will never get any information. You will find that there will be some who may be in the building with weapons. You have to take some actions.

It seems to be today, that even though you know he has a weapon on him, you have got to take certain precautions so that later you will be legally right. For instance, we found a youngster with marijuana in his hat. We took it, and found that he had also stolen a coat, which he had in a bag. The first thing we had to think about once we got him down to the office, was, first of all, how can we do this so that we can be on solid ground if we have to go to court with him. One of the assistants said that we can't really search him unless he lets us. Basically it is coming to that, even though you know that he has a weapon or narcotics on his person. In order for it to stand up in court, you have to make sure that you do it in a certain way. In some of these cases, I just don't know how we can do it, and really effectively operate a building.

PANEL RESPONSE

If a person has a weapon, and you know that it is in his locker, or it is on his person, how can you make him aware of all this: let him know who told you? If you do this, I think that you will find that you get much less information, which I think you have to have today if you are going to run a building effectively.

Today you will find students are afraid to go to court. You tell them they have to sign a statement and they will tell you no, they will not sign it, because, in fact, they are afraid. Now they will tell you that it happened and explain it to you, but you can't get them to sign a statement or get them to go to court and testify. It makes it rather difficult, which means that many of these cases are thrown out of court. Therefore, it makes the control of buildings much more difficult. I feel this is one of the legal handicaps placed upon the administrators.

I think definitely that we should all be told of our constitutional rights. Many of these would be very difficult to put into practice. For instance, I doubt very seriously, that you can find many students (even after they have been approached by one with a weapon), to prosecute. They may tell you, but in many instances, will not sign a statement indicating that it happened. Which means that you don't have any way of moving the youngster, basically, from the school. I think that most of the students today are very much aware of their constitutional rights and they use this in many cases in getting around doing the things that we would like them to do. But again I think that it is a learning situation for all of us.

We will just have to learn to operate within the law and make sure that they have all of these legal textbooks. However, I think the right to pass out certain types of pamphlets, written material in the hallways can create quite a problem for school people. Freedom of speech must be protected, but again I am sure that most high schools in the large urban areas, if permitted to say what they really want to, in an assembly that they might call, or in one that might just have happened in the hallway, would have so many disruptions, that it would be almost impossible to operate. My only question is, "How can we put some of these things into practice and operate effectively?"

VAN ALSTYNE'S REACTION TO SELDON

I think some of the difficulty rises again from the unnecessary and unfortunate misunderstanding of legal norms. Take for instance, the problem of search and seizure. I think there is a misunderstanding of the Fourth Amendment's protection of privacy. I think there is a difficulty, you see, that some seem to be suggesting that the minimum constitutional requirement is preceived by those on the firing line to be, frankly, infeasible and therefore, not necessarily an intolerance or a resistance to the spirit of fair play. It simply is the agony of trying to find ways to apply the norms and still live within one's own school. I mean to suggest, however, this is an unnecessary conflict. But I think feasibility and fair play are reconcilable, under these circumstances. We have simply not given it enough specific attention.

Let me try to suggest ways in which I think there is a greater feasible way in reconciling these norms, and I feel no change that I didn't anticipate all this because as you have recognized some of these problems have to do with political demonstrations as such or free speech as such. But they have to do more with the run of the mill tough kid problems on that particular urban school campus.

The search and seizure proposition, for instance, like procedural due process, is not a single thing. It does not mean that in every case where one believes that a person possesses a weapon or heroin or something else. Irrespective of all the circumstances he must first cautiously go down to the police station, persuade a magistrate to issue a warrant, then officially execute it by an officer. The Fourth Amendment did not operate that way, with regard to police themselves. There are, for instance, circumstances where a search may be made on the spot in the absence of a warrant. Such a circumstance would be where the person has already been placed under arrest. Or the policeman on the spot discerns he has either violated a misdemeanor ordinance or a felony has been committed and there is reason to believe this man has committed it.

SPEAKER'S RESPONSE

Thus the individual has been placed under arrest and a close immediate search of his physical person restricted in nature may then be made. When a man is seen dashing from the bank, for instance, and then runs into a private apartment building with a policeman in hot pursuit, the policeman may pursue him into the building without interrupting the chase to go to his friendly neighborhood magistrate to ask for a search warrant. There are exceptions for hot pursuit.

Not more than a year ago the retiring and liberal Chief Justice Warren in a case involving the state of Ohio, a case called *Terry vs. Ohio.* The stop and frisk situation, which brought a great dissent and which is very controversial, but which furnishes an additional illustration, for instance, the requirements of the Fourth Amendment are not as rigid as lay people customarily think of them. *Terry vs. Ohio* had to do with a factual situation where policemen observed two men walking up and down at a rather unusual hour before a business establishment, holding close conversation, looking in through the window, coming back and forth a variety of times. He had been a patrolman for something like 15 years. He stopped them, asked questions, finding the responses less than edifying, indeed they contributed to his total suspicion as to the occasion of their presence at the time, he then padded them down. It is a step by step business. It isn't though he immediately placed them under arrest or threw them to the ground or tried to give them a stomach pump or something else. It is a very careful step by step reconciliation for the needs of law enforcement plus the physical integrity of the men involved. The court divided five to four. But the technique was upheld. By upheld, I mean the evidence that the patrolmen secured from the men by padding down and taking from their coats certain things, that evidence was subsequently held to be admissable in a regular criminal trial.

To the extent that one knows, for instance, that the student had a weapon on his person, and if indeed there is a proper school rule, it is arguable, there is no case on this, it is arguable that if there is great probable cause, if indeed the information subsequently refuses by a neutral prioral fact was sufficient under the circumstances to warrant that degree of personal intrusion at least to pad the boy down. My analogy, that kind of procedure might be a pill.

To take an analogy from still a different area, for instance, about a year and a half ago, the court for the first time applied the Fourth Amendment to the area of welfare searches. The man in the house, the midnight search, and held that that degree of intrusion of privacy is constitutionally tolerable but simultaneously in a competitive fix observed that to the extent that there are legitimate state interests in the enforcements of safety codes, for instance, or building codes. Here is reason to suppose that there is indeed defective wiring in the house the state may authorize a kind of intermediate search provision. An administrator who acts according to information where there is reason to believe that the house contains a dangerous condition, the administrator may issue an administrative search warrant for the particular premises. I can't sketch it as very broadly, it is itself a very nebulous drawing in a controversial area. I do mean to suggest, however, that it is clear the Fourth Amendment does apply to students. Indeed, there are several cases where the expulsion or the criminal conviction of a student based entirely on evidence which was taken from his locker by a policeman, who had merely a guess or a hunch or an anonymous tip or a notoriously nonreliable, unknown source, has been revised. There is a trade off between the need for personal integrity and privacy and the need for public safety. I do mean to suggest, however, that a more professional tracing of the field, will show a degree of feasibility which can give us comfort and suggest that we are not making a choice that either the students be cast in limbo and treated constitutionally as though they were somehow nonhumans, different from the teacher, entitled to constitutional security in his future career, different from the man on the street, different from the home owner, different from the landlord. There is no intellectual case, I suggested, to put students in limbo and to say that the Fourth Amendment does not apply and on the other hand, and an equally unacceptable proposition, but what the Fourth Amendment means, applied to students, is the schools are helpless in protecting themselves or setting minimum standards of integrity or safety. I don't want to enlarge upon it, because we have other questions. I do mean to suggest that there are administratively feasible means of reconciling a decent leave or physical integrity of the individual student for the safety of the schools.

How does the person know what is the basis of this knowledge or his guess or his intuition that the student in fact has the heroin or the gun. If we do not require some modicum of real probability can it not be seen that the possession of ambulatory search power can be in itself extremely abusive, extremely hectoring, and the abuse of which frankly will lead to more campus fracases than a scaled down or proportionate use under the circumstances.

The other item I wanted to direct my attention to, because I can't give nearly a satisfactory response, is the difficulty in making a case against the student where the case depends upon the willingness of other people to step forward and speak to what they know. I have no doubt that it is quite right to say that students, even more perhaps, and at least as much, as the rest of us, are timid and shy and sometimes downright fearful to come forward and confront the person whom they are accusing. But is it not equally true that that is true in the rest of civil society. It is a nuisance for us to appear in court. It is sometimes a matter which places us in some apprehension. There may be private retaliation if our name is known to the man whom we are accusing of buglary, or rape or murder or something else. That is true. Yet, really the benefit here is resolved the other way. That is to say, as against the two hardships, the degree in which the order may be slightly impaired by requiring the right of confrontation and the hardship on the other side, the man may be convicted on the basis of evidence of which he has no knowledge and therefore is in no position to answer at all the general proposition has been in favor of resolving the benefit of the doubt in favor of the accused.

I know of no court of criminal justice, even if the accused man is believed to be a member of the mafia, with machine gun enforcers, against witnesses. I know of no court in the United States which would constitutionally tolerate the conviction of the suspected man with no opportunity even to know the name and the substance of the testimony that was offered against him. That would be regarded as a kangaroo court.

As the Supreme Court observed, incidentally, in a case involving a juvenile court and its very process two years ago, the condition of being a boy does not justify a kangaroo court.

I think, therefore, one must face up to the facts that to a certain extent, and here I back away from my confidence of my earlier observation, that to a certain extent one must recognize that the function of procedural due process is not to make more efficient the enforcement of criminal statutes. Quite the contrary, it is for the protection of the accused rather than for the efficiency of the social order.

It is strange, however, in this field that even the most conservative justices on substantive issues, the extent to which speech is protected, for instance, the extent to which the state may legislate against conduct. Some of the most conservative justices on substantive constitutional law have simultaneously taken an extremely generous view on procedure on behalf of the accused person. A well known conservative of the Supreme Court made an exception in the field of criminal procedure and more than once noted in an opinion of his that the history of liberty has largely been a history of the observance of procedural safeguard.

The conviction of a student and conviction in the sense of ruining his future educational career seriously crippling his income prospects for the remainder of his life on the basis of purely anonymous testimony that he does not know about and had no opportunity to rebut at all, impresses me whatever the infeasibility of requiring confrontation as essentially offensive to one's sensibility and I do not see any escape from some requirement of this sort. Now it will remain true, of course, in some cases the school does not have the same power of subpoena as a court of law, and thus cannot compel the attendance of witness. But I suggest that there are two feasible alternatives here. One of course, is to have state legislature or school boards, assuming that they are otherwise authorized, to adopt such a rule to possess the equivalent of a subpoena. That is to compel the attendance of those who may have evidence against an individual. The substitute that one court has suggested is this. That where the school cannot assure the presence of an adverse witness, and where the testimony is nonetheless crucial or at least immediately relevant to the determination of the violation to the rule, the school under that circumstance, while it has no constitutional duty to bring the man into the hearing, must make available to the accused the name of the witness and the substance of his remarks. Without at least that much, he frankly is in an inadequate position to know what it is that he must answer, what it is that he must clarify, what it is he must overcome in order to reestablish his innocence. I should think at least that that would end some degree of feasibility.

RESPONSE TO WILLIAM VAN ALSTYNE

by

Charles Gonzales

President

Student National Education Association

I feel the need to put some perspective to the issues that are raised this afternoon, by talking around the circumstances that lead to protest and speaking to the whys of protest from a student's point of view. It is a first for me in that I will have to read some notes because of the time limitation.

Society to me is in a condition of national crisis. The American dream is becoming a nightmare of meaningless values and contagious chaos. The spirit of the national community is dissolving, and we find ourselves becoming increasingly polarized. This polarization affects both people and values. The confusion of values distorts our image both at home and abroad creating mistrust, disrespect and panic. At present we seem ill equipped to do anything about this situation. We voice old platitudes and outworn slogans rather than attempting an honest appraisal. For the sake of security and power, we have plundered our spirited people. Our citizens have become numbers and slots, competition and greed, and the salesmen and the promoters of gain and profit have become the measures of significance, and America finds itself to be a dehumanized punchboard instead of a human living community.

UPSURGE AND UPHEAVAL IN SCHOOL LAW

Nothing seems to work. We obstinately cling to ineffectual approaches to change, whether they approach the liberal or radical, reactionary or conservative. Our clearest approach to today's problems is the approach of non-approach: apathy.

The symptoms of our condition increase all around us. Violence has become the order of the day. Our cities are powder kegs, our people frightened and polarities frightened because of it. The people of the ghettos see where this nation is headed and understand too well that their own needs are not honestly considered. Their reaction is one of panic leading to riot, militant mobilization or deeper apathy.

Our colleges and universities are stumbling under the threat or reality of violent student action. Many college students clearly see the self-destructive path of our nation. We are both bewildered and enraged, feeling that the institutions of learning have fallen prey to the self destructive path and are teaching the feats of this death march instead of pursuits of human excellence. Students on all levels are taught one thing and see another in practice. We are taught the Bill of Rights, we are taught honesty in church, yet we see a Justice of the Supreme Court forced to resign for a violation of judiciary trust. We are taught brotherhood and love at home, yet our nation fights to maintain itself as the world's largest owner and producer of nuclear weapons.

The youth of today are faced with imposed social isolation. We have to interject ourselves into the community in which we have had no real opportunity to participate. But we are no longer content to be ignored and we are desperately searching for ways and means to be heard. We are however, neither taken seriously or listened to. It is regrettable that any statements of student rights need ever be written. The rights enjoyed by an individual attending an institution of higher education should be ideally the same as those rights we have been all granted by our Bill of Rights. Unfortunately, this is rarely the case. We are taught to conform to a prescribed ideal. The American student learns at an early age that success depends upon "learning the ropes". Our curriculum is outlined, our initiative channeled, desires repressed, experiences delayed, responsibilities withheld, maturation interrupted. Many young people seek comfort among themselves, for they feel there is no person except one of their own to whom they can turn for help. I see in my past generation the evil which has brought society to where it is today. Many students react by cutting themselves off from society, creating a subculture of their own. Some respond by rebellion, or escape, and others albeit a majority, dedicate ourselves to bring about subsequent change in the society of which we are a part. Given this analysis, the youth represents an untapped reservoir of energy which will respond if given understanding, direction and concrete opportunities to prove itself. What is needed is a process to combat this alienation and restore confidence in our original purposes–democracy and the respect for universal human dignity.

The democracy proposed is procedural. It is procedural in that the problem in education and in society is the process problem and the solution of that problem requires the process approach. Process is how it is done, while purpose is why it is done. Process and purpose are part of a single continuum that proceed together. For example, the very process of democratic citizen participation in eliminating apathy is more fundamental than the specific purpose of ridding the alleys of dirt. At this point, process is really purpose. As educators and lawyers, you must certainly realize that human dignity and respect is the basic philosophic precept of the democratic way of life.

When the dignity of people is respected, young people cannot be denied the elementary right to participate as fully as possible in the working out of our problems. Self-respect depends on active participation in resolving crises faced. To give young people help without their having played a significant part in the action, makes the help itself relatively valueless. In the deepest sense, it is not giving but taking, taking from their dignity. Denial of the opportunity for participation is a denial of human dignity and democracy. It will not work.

The alternatives are as clear as they are frightening. Either we react with fear and respond in all ways, or we accept the challenge to question the assumptions that underly our current way of life. You must listen with open minds to your young friends. History rarely presents this opportunity. We must meet it head on, for the determination, resources, and creative ability of young people can bring new vigor to the American scene.

Much as the fathers of our nation brought freedom to their brothers, the youth to today possess a determination that is narrow in the last hours of labor, waiting to give birth to a challenging new trend in the contemporary history. This determination goes beyond seeking another faddish program or fabricated project. Instead it consists of a basic belief in one's country and a real understanding of how outdated assumptions have produced so much useless affluence and dire misery. The price for a renewal of spirit and a sense of community will be great for all. It requires of youth, of anyone, a total price which is beyond the mystique of revolution based on naive tactics and no strategy, a rejection of middle-class guilt venturing, of involvement in innovative programs of liberal reform that serve nothing but the interest of corruption. The price, the renewal of spirit. A community can only be born of a common vision. That vision is being widely revealed in the hearts and minds of young Americans, and history now gives us the mandate to come together. We understand that it is now a time to end the senseless violence and self destruction and instead to celebrate a vision. In that celebration the birth of a vital America will be discovered. The present reveals the vision and the community is waiting.

VAN ALSTYNE'S REACTION TO GONZALES

I hope you share my difficulty in seeking to respond to that. It is very awkward to try. For without wishing to appear ungallant, there is a certain seriousness of rhetoric in Mr. Gonzales' statement. It seems to me that it is the mirror image of the fierce rhetoric he seems to protest. That is to say, the statement opened as I recall to a certain indictment of an American hypocrisy for having stated national aspirations which we have failed to fulfill. Yet in the more profound statement toward the end, it seem to me that we were receiving echos of the same sort of unspecified aspirations based upon a kind of sublime faith.

There is something intrinsic to you that can discover the proper way and bring about a national salvation. I suppose it reflects an unchivalrous professional bias in trying to respond to a remark such as that. But one finds himself uneasy because of the relative generality of the aspiration. I think none of us can hope to take exception to the spirit, or the integrity or the intensity of Mr. Gonzales' feelings. But I for one am at a great disadvantage in trying to frame a response to an unspecific kind of program or an unspecific dramatic conviction that youth holds some kind of genetic insight into the resolution of very important national issues. I think there is, however, a message, I do want to try to relate it to this discussion or rather perhaps to show the limitation on the relation.

Mr. Gonzales' remarks in a different sense reminds me very much of the commencement address that Dick Gregory gave to the undergraduates at Harvard College about two years ago. He closed with an antidote and it was the specificity of the antidote which seemed to me that made his point so very well about the raw edge of American lives. He tried to describe the particular predicament he was then protraying: the difficulty of Negro American lives according to a more homespun story that we would all recognize. It was this: Suppose that one is waiting in the subway for a train, with some little time on his hands. Feeling a bit hungry, he goes over to the confection machine and puts in a quarter. He pulls the lever as he is instructed to do. Nothing comes out of the machine. So he tries the lever again. Still nothing comes out of the machine, but he has invested his twenty-five cents, as he was told to do. Then he tried the other levers. Nothing comes out of any of the other slots either. Finally he yanks on the coin return lever. His twenty-five cents does not come back. Then he looks up on the mirror on front of this machine and he finds a little sign. In case of difficulty, write the home office in Des Moines, Iowa. So what does he do. He kicks the goddamned machine, that's what he does. That is what a hell of a lot of people are doing to the American machine, right now. It is in that sense, unresponsive.

It seems to me, in that sense, it caps a heck of a lot of frustrations of various groups which includes the young, the poor, and the black of the United States.

As one makes a close examination of the different parts of that machine, one finds it is in very bad disrepair. The difficulty I have, however, is in two respects. First, I am unclear as to why a special indictment should be made against institutions of higher education as such. It is not a new discovery and not a difficult discovery that a university, and educational community, is enormously vulnerable to violence. The buildings will burn, the files can be destroyed, and there is power in a match. That discovery was made very long ago. The possession of power to destroy surely ought not be confused with some kind of constructive or creative addition. I am a little bit puzzled, though I can see some connection to be sure, requiring introspect at every institution of higher learning. Why those academies which attempt to use the process of reason are themselves made the immediate objects of the most terrific violence these days in American lives. There is something in the mode of demonstration which is so anti-democratic to any probable resolution of dispute that it mildly bothers me.

George Boyes mildly suggests that there is a new primitivism emerging in American lives. It is a primitivism which believes that the heart is sounder than the mind, that feelings are better than reasoning, that the intensity of explosive emotion somehow can intrinsically carry its way to a new social structure, simply by being restless and by demonstrating the capacity for energy. Yet I do not know if that has any rational basis for working. The random probability for instance, the random probability without my describing anything more about the factual situation, suggests that by lying down in front of a truck, one will do anything other than to stop the truck is no better than 50% at best. All I am trying to suggest, therefore, is the capacity to demonstrate, the capacity to stop the machine per se, does not carry beyond that vision to any resettlement of society. It does carry with it a parable which I do not believe is properly understood by many who overuse the technique of confrontation and civil disobedience, frankly for lack of historical prospective.

SPEAKER'S REACTION

It is felt, I believe, that the dramatization of deeply felt grievance to the techniques of civil disobedience and confrontation can only be on the plus side, that they advertise and bring to public attention that which would otherwise escape public attention because the goddamned machine isn't working and the home office is out in Des Moines, Iowa, where we can't reach it. But there he is at the same time. There is not at least by an historical reflection, a very commanding peril in the escalation of this technique. It may indeed sear the public consciousness. It may dramatize the grievance. It may bring about a meaningful solvence to problems. It may on the other hand merely usher in the man on horseback who thrives upon the public apprehensions, who thrives upon its animosity and impatience, and then throttles the society with a new arrogance and a new doctrinaire approach and a new rigidity and a new totalitarian regime which rather than representing any forward movement, may set us back several decades.

I can't help but feel, as a private matter, that there are now echos of reaction in American life. This suggests that the immediate future of mass confrontation in the United States will not produce the solar of social solvent. This is hardly the way to an augmentation of dignity for all Americans.

TRIBUTE TO LEE O. GARBER

by

William Griffiths
University of Massachusetts

I think it is unnecessary to remind this group of the achievements of Dr. Lee O. Garber. He was a founding member of NOLPE, served as Secretary-Treasurer before the days of the Executive Secretary, and later as President. As users of *The Yearbook of School Law* we can appreciate the magnitude and complexity of the task that he undertakes annually. The task of reading, digesting and, more important, of communicating the essence of court decisions is in itself enough to deplete the energies of most of us, but not Dr. Garber. In countless journal articles, especially in his regular contributions to the *Nations Schools* he cuts through the maze of procedural intricacies, recognizes the relevant, and communicates the significance and implications of the law in terms school people can understand. His many books occupy a significant portion of any school law bibliography. Additionally his surveys, reports, consultantships have been quite numerous. He has, indeed, gained the ultimate in professional success.

Those who know him intimately can respect his professional success but admire Dr. Garber for a still greater success and that is success as a human being. With all of his achievements and resulting prestige, he remains a humane person, friendly, willing to help others, warm and courteous in his relationships with all. This is to me the mark of a great man. On behalf of NOLPE I take pleasure in making this presentation to Dr. Lee O. Garber. The plaque reads: "Honoring Lee O. Garber for Outstanding Leadership and Service in the Field of School Law. Master Teacher, Distinguished Writer.

TRIBUTES

Presented by the National Organization on Legal Problems of Education, 1969."

Dr. Garber: May I have a minute to respond. I hope you don't take Bill seriously. Bill is the greatest con artist I know. Bill never had a course in School Law. He was my graduate assistant in 1962 and along about the last of October I had to go to the hospital and the Dean said, "Well, what are we going to do with your classes? None of us know anything about School Law." I said, "Let Bill Griffiths handle it, he can do it." So Bill used to come to the house regularly, at least once a week. We would go over the assignments; he would go back and teach.

I came out of the hospital in November for about a week and a half and then I went back in again for an operation and I didn't meet my class until the last meeting of the year. Bill had done it all. He had read all the papers and I opened the grade book and there was only one student who had straight "A" and who do you suppose it was?

Bill took his degree with me and I am proud of him. Most of you may not know him. The last thing Bill said to me, I think before he left town was, "I never knew I was interested in law, but now I am." And he said, "I am going to take a degree in law before I am through." I sort of laughed and said, "Bill, you know you'll never do it.

He had been a graduate assistant for $1200 for two years and he had almost starved to death and I didn't see how he was going to finance law school but I knew him well and I knew he had enough perserverance and I am happy to tell you tonight that Bill will get his law degree in May leading his class. He has been going to night school while teaching at the University of Massachusetts. Bill deserves this honor as much as I do.

Now I want to thank NOLPE for this, I appreciate it more than I can tell you. I built a new house when I retired and then Ben Hubbard down there induced me to come back and I have been teaching again. I had to get a new study, my old one wasn't big enough when I built it. My wife asked, "What are you going to hang on the wall?" I said, "Wait until I come back from NOLPE, I'll have something. Thank you."

TRIBUTE TO EDWARD C. BOLMEIER

by

H. C. Hudgins, Jr.
Temple University

I wonder first of all, President Joe, if you knew what you were saying when you made the introductory remark tonight. You referred to both of these men as being very productive. Those of us who know Dr. Bolmeier know that he has two very lovely twin daughters. Was this intentional? I wonder.

Mr. Justice Joe, and may it please this court, I want to charge here tonight that one individual, Edward Claude Bolmeier, unintentionally has violated the 14th Amendment. He has clearly demonstrated that he has denied NOLPEans equal protection of the law, that he had abridged their privileges and immunities, and he has given an original, unique interpretation of the due process clause of the 14th Amendment. I prove my case thus.

Through very ingenious organization and judical planning, he timed the first School Law Conference held at Duke University to coincide with the '54 *Brown* decision. As a result of the real interest shown in that conference, in general, and in that decision in particular it was decided that there should be formed an organization devoted to the study of law; hence, the formation of NOLPE. No one else would have thought that such a conference would bring such results.

He has served NOLPE as a member of the Board of Directors, as an advisor to publications of NOLPE and he served the organization as President. It was here only ten years ago that he was installed as President and decided that "national" should be emphasized in the title of the organization by holding the session in Washington, our nation's capitol.

Another indictment: he has created a monopoly in the field of publications. If you looked at the display stand, you noted that since 1964 (five years mind you), he has either authored or co-authored five books in School Law. One person was observing while looking over the display, there's nothing else to write about. He has preempted the field. He has spawned (here again he is productive) a second generation of NOLPEans as evidenced by nine of his students here at this conference. One of his star pupils is serving the organization as President this year.

His fall semester students in 1966 were denied equal protection of the law. It was always understood that if you wanted to take School Law, take it in the fall because you were sure to miss one three hour class while he was away at NOLPE and then the next class would be wasted because he would give a three hour report on what transpired at NOLPE. However, at the last minute he was unable to attend that session in Boston. I think he contracted a cold at the football game the week before. I believe that was the year that Duke beat Ohio State.

He has violated the due process clause of the 14th Amendment on two counts. Procedurally he married Hazel, and this is a very serious indictment. Very few people who have attended one of his law conferences at Duke, have been in his class or have known him otherwise realize that he could not be where he is today without her. In addition to teaching his classes he would often have the students at the house. There they were given a royal reception by Mrs. Bolmeier, the hostess who created very memorable occasions.

I think it was at some of these sessions that we saw America at its best. Swedish meatballs, Southern barbecued hush-puppies, Norwegian cookies. I think about every section of the country was represented on the menu.

To those of us who have a special affection for Dr. Bolmeier as well as for

Mrs. Bolmeier, I think that he is one who exemplifies best the student and scholar of School Law. He studied the law; he taught it; he respected it; and he lives it. We take great pleasure in representing the approximately one thousand NOLPEans in thanking you for all that you have done for the organization and challenge you to keep up the good work. The plaque reads, "Honoring Edward C. Bolmeier for Outstanding Leadership and Service in the Field of School Law: Master Teacher, Distinguished Writer. Presented by the National Organization on Legal Problems of Education, 1969."

REFLECTIONS

by
Edward C. Bolmeier
and
Lee O. Garber

Dr. Bolmeier: I'll respond briefly and particularly comment on productivity. I was reminded at the luncheon today by Lee Garber of an experience I had at the University of Chicago some years ago. A study was being made on multiple births. I was fortunate enough to participate in it by giving many tests to twins who were reared in different foster homes. It was an interesting study; but the most interesting fact was, that while engaged in it, twins were born to us. Shortly after the Dionne Quintuplets were born. Then I told Freeman, the study director, "Leave me out of this one!"

Seriously, I am very grateful to receive this award and particularly from this group for whom I have had a great deal of affection for many years. I have, perhaps a dozen of my former students here, whom I respect a great deal. But this man who made the presentation, I think, deserve a special stamp of excellent superiority. He is a gentleman in every respect and I was pleased to get this from his hands.

Dr. Bolmeier: Lee, I was shocked when I heard Joe say "thirty years ago." I feel I was just a barefoot boy running around in knee pants thirty years ago and I don't know if I can get the early part of this development in School Law. Now I am glad that I have my senior colleague here to fill in this generation gap.

Dr. Garber: I was with the University of Chicago two years before Ed was. I was not precocious, Ed was just a bit retarded. (Ed is older than I am, I tell you.) Before I say anything else, I think there are a few other people who have been pioneers in this field that we ought to think about for just a minute. There is Frederick Weltzin. That's a name most of you don't know. Dr. Weltzin is now Dean, at least he was, unless he is retired, at the University of Idaho. Dr. Weltzin had one of the first books. It dealt solely with tort liability. He tried to develop a philosophy of school law built around tort liability.

And then there is M. M. Chambers, another name that most of you will not recognize probably, but some will. He was a pioneer in this field. M. M. Chambers started the yearbooks of School Law in 1933 and did ten of them. Then he went to the air force. He came back to American Council on Education and did not pick up the project because he didn't have time.

In 1948, when I was teaching at the University of Maryland in the summer, I talked to him. He suggested that I take over the Yearbook of School Law. M. M. Chambers is now getting up in years. I hope some day you can bring him back on this program because he is quite a man. He has been retired so many times, I hate to tell you.

After I retired at the University of Pennsylvania, Ben Hubbard back there in the corner inveigled me to teach at Illinois State University. This year M. M. Chambers joined us; there is no better man, I think, in the field of law that relates to higher education. He's a little older than even you, Ed.

Then, of course, there was always Madaline Remmlein whom we must never forget at meetings of this sort. Well there are three pioneers I thought I would like to pay tribute to for they helped make School Law a respectable subject in our curriculum today.

Maybe we had better reminisce for a while. How did you get interested in school law, Ed?

Dr. Bolmeier: Well, that was a good many years ago. When I went to the University of Chicago I planned to study in the field of school administration. I had some courses that didn't appeal to me a great deal because they weren't really in administration. I couldn't see the practical value of educational psychology, philosophy and the like. I talked to one of my classmates and said I was afraid I made a mistake coming here to learn something of a practical value in school administration. He said there is a course that just started and you can get in next semester, Professor Edwards, in School Law. He had been teaching it for some years but he was really getting into it then because of his book, *The Courts and The Public School.* So I took the course in School Law and was enthusiastic right from the beginning not only because of content but the treatment. We all had to prepare a term paper on a subject of our own choice. Mine was "The Legality of Administering Corporal Punishment." That appealed to me, I suppose, because when I was a kid I deserved a good deal of that. I thought then it was pretty good. But I can tell you now that honestly all I did was take Edwards' book, deteriorated the language somewhat, and turned it in as my own. I didn't know that wasn't the proper thing to do.

He saw me after class one day and said, "Bolmeier, I wish you would come to my office for a while." Although I thought well now what in the world can that mean. I was a little afraid of what it might be about. I went to his office. He lit up his pipe and took a couple of good puffs. Those who know him know how he did that. When I spied my term paper on his desk, my heart sank. I thought ok, I guess this is what they call plagiarism and he caught it. I was pretty scared. Then I thought if I got a low grade on the course it won't be so bad. He said, "Sit down Bolmeier. I read your paper over with interest and I think it is very good. If you would permit me, I would like to have it published in the *Elementary School Journal.*" I can't tell you how happy I was. That's when I first burst into print. Later he was instrumental in getting me to work on the study that was done in Georgia by the political science department on city and school relationships. I was fortunate enough to work on the legal aspects of that. That was how I began. How did you ever get started?

Dr. Garber: I went to the University of Chicago as a graduate student in 1929 and took the course with Newton Edwards. Most of you may not know that Newton Edwards was a top notch scholar of American History.

He had taught History of Education in the School of Education although his rank was in the Department of History. When he got too busy to continue his work in the School of Education, Edwards taught the course in the History of Education. Like you Ed, I had to take some courses that I didn't care for like philosophy, and psychology. But in my first year I took the course in History of American Education and I am telling you I learned more American History in that course than I ever learned anywhere. Newton Edwards was a real scholar of American History. I liked him so much as an instructor that I looked in the catalog to see what else he taught. Next semester I signed up for his "Legal Basis of Education." Now it so happens that I had done little over two years of law. I had hoped to be a lawyer and was waiting for that course where they tell you how to start a practice without starving to death for seven years. They never offered that course in law school so I dropped out of law and went into Education. After taking that course with Newton Edwards, I knew where my interest lay. I finished there in 1932 in the heart of the depression when you just couldn't get a job. I had gone to Butler in the fall of 1929 or 1930 and offered a course in School Law. That was the first time I had ever taught. That was my entrance into School Law. I had the legal background but never any realization that it applied to education.

Dr. Bolmeier: Lee, I do think, considering this group and our interests, we should say something about NOLPE, the organization that is honoring us this evening. About 1950, the Kellogg Foundation was giving money to institutions to improve the teaching of school administration. I was fortunate enough to be the representative from Duke University for that study. After participating at Columbia University for some time, I tried to think of some project that would help to improve school administrators. Kellogg funds could probably be used to some extent. I wanted to have a regional meeting, dealing with the subject of School Law, legal problems of school administration. We did get some funds and invited several hundred persons to come to a School Law conference. It really developed into what is now referred to as the Duke School Law Conference. We had to pay the traveling expenses for the folks who came, but we had all the folks in that part of the country who were interested in School Law. It was in 1954 right along with the *Brown* decision. At that time some thought had been given to an organization to study the field of School Law. Lee, I remember I had done some spade work a couple of years before and had some information. Madaline Remmlein really conceived the idea of an organization. At first, we thought it might be under the umbrella of the NEA, but Hubbard advised us against that. It was really a small organization. We announced that we were considering an organization. Most of the North Carolina superintendents stayed around and listened. There were about sixty persons who wanted to join. The registration fee was $1.00 and I think that was why there were so many from North Carolina. After the admission fee went up the North Carolinians seemed to drop out, and membership came more from the richer states, New York, New Jersey, Ohio, and Kansas.

We had an interesting start there and before I give the mike back to Lee, I would like to tell about how the school law conference we had there fit in NOLPE. Some folks thought that there would be some jealousy and we'd be working against each other. I don't think NOLPE was harmed much by our School Law conference and I feel that our School Law conference was successful because we could draw upon NOLPE. Many NOLPEans participated in the program.

Lee, I am going to mention this because of Dale Gaddy, Joe Owens, and Joe

Bryson. They didn't know if Van Alstyne would get here for that 2:00 meeting. One evening we were going to have Lawrence Derthick who was U. S. Commissioner of Education, a great man, whom many of you folks know. Dr. Derthick said he would come by plane that was to arrive about 4:00. This was in June and there was no thought of the plane having any trouble. But I got a call from Dr. Derthick in Washington and he said the plane was late in getting off; go ahead and have dinner and he would go directly to the auditorium where we were having the meeting. That sounded all right, but when we got through with dinner there was another call: the plane still hadn't got off the ground. Well we waited, and then I was really sweating. Another call came: the plane isn't going to take off, and he couldn't send his manuscript as Tom Shannon was trying to do the other day. You can imagine how I felt? The people were coming from all parts of the country to hear Dr. Derthick. Dr. Eddens, President of Duke University, was moderating the program that evening and they got Dr. Carroll, State Superintendent of Public Instruction in Raleigh, out of a sick bed to introduce Dr. Derthick. I never felt worse in my life, knowing how this was all going to end. I'll be darned Dr. Eddens got up and welcomed the folks, made a few comments, told a couple of stories and said and now Dr. Carroll will introduce the speaker. Dr. Carroll got up and introduced the speaker in absentia. Of course, they were all looking around for the speaker who wasn't there. To make it still worse after the introduction Dr. Edden said, "Now Dr. Bolmeier we will turn the meeting over to you." But I happened to think of something that fit in very well and I am mentioning this to show how NOLPE came to the rescue. I told about a superintendent, a great speaker, who had been engaged to speak all over the country but he never wrote his own speeches. His secretary wrote his speeches and he would get all the credit. His secretary was getting fed up on this and thought I am just going to get even with that man. So the superintendent started making his speech like he did the other times; it was flamboyant, just great, and everyone was just lapping it up. All at once he stopped, flustered and bewildered. His face got red; he stumbled around and lost his equilibrium. Finally, he finished his address. Well one of his friends came up afterwards and said, "John, what in the world happened to you? You were going along just famously and then all of a sudden you seemed to hit a dry spell or a blind spot, what happened?"

He said, "Look here, I want to show you something." He showed him the manuscript and all at once there was a page with just these words, "Now, damn you, improvise." That was really a message for me to improvise, but a thought came to me, here are all these NOLPEans. I could mention them. In addition to Lee, there was Gene Lawlor, and Madaline Remmlein and Warren Gauerke, Ed Fuller, and Ed Reutter. I was going to say Marty Ware, but I think she was just a little girl in pigtails at that time. We just turned the meeting over and had a church revival, with testimonials. It turned out to be one of the best sessions we ever had. Do you remember that, Lee?

Dr. Garber: Ed, you forgot to tell them one other thing about that first law conference.

They were all school administrators and I never saw such a negative group in my life when it comes to talking about what we should do in the conference on school law. Do you want to tell them about that, Ed?

Dr. Bolmeier: I don't know if I can talk so well on that but I would like to mention one thing which I thought you were going to bring up. Right after we had our first conference and after we had the *Brown* decision, regardless of the topics or papers that were assigned, they all turned into arguments regarding segregation. So the next year, the folks would ask me when are you going to have another conference on segregation. We didn't intend that at all. The next year we had a couple of prominent speakers. One was Dean Fordham, Dean of the Law School at the University of Pennsylvania and the other was John Fisher, now President of Teachers College of Columbia University. They made wonderful presentations, but this was pretty much in the deep South, but not as deep as some other places. We had one fellow there who was really from the deep South. After we got through with the whole meeting, which we thought was pretty good, he lambasted me and the others for the type of program we had down there, and for bringing this damn Yankee from Philadelphia to interfere with their way of life (that's the way he put it). He picked on Dean Fordham who grew up in North Carolina, went to high school, and got his law degree from UNC.

During the School Law Conference, he commuted to Greensboro, where he stayed with his mother. We ran into many situations like that.

Dr. Garber: I would like to amplify that a bit. On the last day of the conference, about one minute to four, the person in charge of that program announced that they were about ready to adjourn when this fellow jumped up. He identified himself as a mechanic in the mills and he told us that no one loved the Negroes more than he did. But, he said, if God intended us to associate together he would have made us all the same color. Then he pointed to Dean Fordham and said, "Where do you come from?" Dean Fordham said, "North Carolina." He said to John Fisher, "Where are you from?" John Fisher said, "Baltimore, Maryland."

Dr. Bolmeier: I would like to come back to NOLPE. Lee and I think a lot of this organization. We saw it developing and there is one thing that we observed; at the beginning we had too many school administrators as compared with people from the law schools and practicing attorneys. I heard the report this morning showing the large number that we have now from the legal society and I think that is just wonderful. I think that is what makes this organization one of the fine organizations. If it were up of all school administrators it would just be another adjuct of the NEA or if it was made up of lawyers only, it wouldn't serve the purpose. I think this is very beneficial. But there wasn't that feeling right at the beginning.

Do you remember Lee when they had what they call an advanced seminar in School Law at Columbia University, Teachers College. Ed Reutter sponsored that seminar. You and I, and eight or ten other persons attended. Others who participated were from various disciplines such as Sociology, Economics, Education, and Law. I remember one young fellow representing the law school who chided us for trying to deal with problems in law. He made it quite plain to us that if we had legal problems we should go to a lawyer. I responded that the best person to deal with such matters is someone who had training in both fields, school administration and law. Fortunately we have a number of such persons: Lee, Madaline Remmlein, Reynolds Seitz, and Walt

Hetzel. Some of us weren't fortunate enough to get degrees in both fields. But I think those who contributed most tried to bring the problems of education together with those of law.

Dr. Garber: Ed, I wonder if it's time we ought to get to the topic Upsurge and Upheaval?

Dr. Bolmeier: I feel honored to be associated with my colleague here, Lee. It's remarkable to realize what he has done over the past thirty years. He is trying to be young again; he says twenty years. He has sought every case in School Law that was heard in a court of record. He studied them, analyzed them, and reported all of them. I don't think there is any other person in the United States that can claim that. I think I have looked through all of them, but I haven't gone into detail and analyzed them as he has. Surely during all the scrutinization, study, and analysis over the past twenty years, Lee, you found some trends that are interesting. I would be pleased to get your comments.

Dr. Garber: As I told you, I took over the School Law Yearbook at the request of M. M. Chambers. Chambers had collaborators, each one doing a different chapter. But M. M. Chambers said to me, "Don't do that because they won't all come in on time. If you want to do it, do the whole thing." It was quite an undertaking, but it wasn't too bad.

My first yearbook came out in 1950 covering the year 1949. That year three cases relating to schools were decided by Federal Courts. In 1951 there were four. In 1954, the year before the *Brown* decision there wasn't a single case I didn't locate through the digest system. Last year in our yearbook we reported seventy-eight or seventy-nine decisions from Federal Courts. I suppose the trend started with the flag salute case; but certainly the *Brown* case gave impetus to Federal litigation. Since the court stressed individual rights in the *Brown* case, more school law now is in the area called constitutional law.

REFLECTIONS

There are rights of pupils to attend school regardless of race and color. More and more we are getting cases on the rights of teachers to wear beards and what not. By the way, that was a wonderful address we had this afternoon and I think as you listened to that you couldn't help but realize this field on constitutional law is becoming more and more important.

The more I read in School Law the more I realize that the day of a professor of School Law who **has** had one course in School Law and gets his material from secondary sources is over. We must rely on attorneys. We must have men trained in law to teach the courses in school law. That's why I am happy to see a man like my friend Bill Griffiths. I was scared to death that once he finished law school he would go into a law practice. He tells me he will stay in the field of administration and will teach school law. It won't be necessary for all to have the law degree, but they should get some work in the law school particularly in the field on constitutional law.

Many of you know Ed Reutter. Before he started teaching school law, he went to Columbia University Law School. Some of you may not like to hear me say it, but as I read the trends, you must have legal training today to interpret a good share of the cases coming out of Federal courts. These are a few changes that I see are taking place, Ed. Any questions you want to ask me?

Dr. Bolmeier: Yes, I am interested in the cases that Dr. Van Alstyne referred to today regarding student rights. As we all know, there is great dissatisfaction on the part of students. There is militancy, discord, dissent, and rebellion.

Dr. Garber: I am waiting for the first case to come up with respect to high school fraternities and sororities. Some attorneys believe that pupils are deprived of the right of association. I'll bet our next case regarding fraternities and sororities comes up in the Federal Court as a right of students under the Federal Constitution.

Dr. Bolmeier: I'll be waiting for that. It will be interesting; but I think it will be a good many years.

I am thinking now particularly about student discipline, and I want to refer to that now since I see one of my friends, Dr. Suthers, sitting in the audience.

It was my privilege to visit Dr. Suthers' school in Nellis County, Florida. It is one of the ten largest school systems in the United States, an excellent system, with an excellent staff. Dr. Suthers invited me to speak on student behavior. We dealt with some of the cases of 1968 and 1969 which Dr. Van Alstyne referred to today. (That was a very enjoyable session that we had today.) I brought back one story that is quite appropriate.

There are many who think that we have all this boisterous activity on the part of students in our high schools and elementary schools because we have been too soft on our discipline particularly in the homes. Parents have no control over the youngsters who run rampant and do whatever they wish. I heard of one couple with two boys who used an awful lot of profanity. It disturbed the parents but they couldn't say anything without attaching some profane words to their comments. At last the parents got disturbed enough about it that they went to see an educational psychologist. They explained that their boys used so much profanity. He said this is no problem at all. When one of them used profanity, apply corporal punishment. The next morning when the two boys sat down to breakfast with their parents, the mother asked Johnny what he was going to have. He said, "Oh, I'll have some of those damn corn flakes." She slapped him on the mouth and he went reeling and his Dad got up and gave him a kick in the seat of the pants and sent him sprawling. Then mother said to the other boy, "Georgie, what do you want for breakfast?" "Oh, I don't know but I sure as hell don't want any of those damn corn flakes."

Dr. Garber: Maybe that's a good note to end this program on. But I do want to say one thing. I was more impressed by the program this afternoon, than I have been by almost any program that has ever been given by NOLPE. I think the quality is improving. Ed and I are out now; we are just a couple of relics. By the way, that man Hubbard down there is a great collector of relics. That's why he picked up Chambers and me. But I say to you, the future is in your hands. I hope you have more programs like the one this afternoon. It has been a pleasure to be here, to reminisce with you. I think we have upsurged enough for this evening.

Dr. Bolmeier: Goodnight!